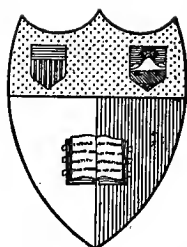




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THE COMMERCE CLAUSE

OF THE

FEDERAL CONSTITUTION

BY
FREDERICK H. COOKE
OF THE NEW YORK BAR
AUTHOR OF "THE LAW OF LIFE INSURANCE," "THE LAW OF TRADE
AND LABOR COMBINATIONS," ETC.

NEW YORK
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PREFACE.

THREE years ago "the power of Congress to regulate commerce" was declared by the United States Supreme Court to be "perhaps the most benign gift of the Constitution," it being even said in this connection that "without it the Constitution would not have been adopted." This accords with the suggestion made by Chief Justice Marshall more than three-quarters of a century earlier, that none of "the evils proceeding from the feebleness of the Federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress."

It seems, then, little less than astonishing that for eighty years after the adoption of the Constitution the power conferred on Congress by the commerce clause was, as stated in Prentice & Egan's Commerce Clause, page 1, "comparatively unimportant." But latterly such power, as it has been said, "has been so developed that it is now, in its nationalizing tendency, perhaps the most important and conspicuous power possessed by the Federal government." (Id.)

The facts just noted may, in part at least, account for the not altogether satisfactory course of development of the law applicable to the commerce clause. During such period of eighty years the provision was applied by the Supreme Court at comparatively infrequent intervals, to matters that seem not to have been regarded at the time as very closely related, thus, steamboat navigation, license taxes, construction of dams, immigration, sale of intoxicating liquors, pilotage. Rules applicable to such matters grew up in a somewhat sporadic, haphazard fashion, with what seems to me to have been inadequate comprehension of unifying principles. But, during the last four decades, the commerce clause has, with enormously increased frequency, come to be applied to a great variety of matters, and there has become almost pain-

fully apparent the lack of such unifying principles, or the insufficiency of what may be regarded as attempted declarations thereof by the courts.

Under these conditions, it seems especially desirable that one at all comprehensively writing on the subject I have chosen, should at least attempt to make a statement of such principles.

Obviously a clear comprehension of just what is *commerce*, that is the subject of regulation, is of vital importance. Finding the approved definitions unsatisfactory, I have defined commerce, as the word is used in the commerce clause, as *transportation (not necessarily all transportation but certainly) including transportation of persons, tangible property and (at least under certain conditions) of intelligence*. In brief, so far as we are here concerned, *commerce is transportation*, and it seems to me to tend to breed confusion, to regard it, according to what seems to be the most approved definition, as essentially "*consisting in intercourse and traffic*," including "*purchase, sale and exchange*."

To me it seems reasonably clear that the founders of the Constitution intended, and perhaps wisely, that the power to regulate commerce or transportation, conferred upon Congress, should be a *merely concurrent* power, the powers reserved to the States including the power to likewise regulate such commerce in any case otherwise within their jurisdiction. But the settled construction of the commerce clause being otherwise, I have contended throughout that the power of Congress is exclusive, not merely *in some cases*, but *in all cases*; that *in no case can commerce within the scope of the commerce clause be regulated under authority of a State*; that, though action taken under authority of a State may properly affect such commerce, in every case this is merely the incidental result of the exercise of some other distinct power reserved to the States.

The view just stated is by no means a novel one, though it has failed of sanction by the Supreme Court. Proceeding on the assumption of its soundness, I have endeavored to remove what may be, or seem to be, difficulties in the way of application thereof. I have ventured the suggestion that the

powers reserved to the States, the exercise of which may affect, without, strictly speaking, *regulating* such commerce or transportation, may be resolved into a few tolerably well defined classes, which I have characterized as power (1) *to establish and maintain means of transportation*; (2) *to control persons and property*; (3) *to regulate the conduct and liability of those engaged in transportation within the scope of the commerce clause*. I here confine my attention to the third class, as the one that has produced the most difficulty.

For the purpose of determining whether, in any given case, the power to regulate the conduct and liability of those engaged in such transportation is within the power conferred by the commerce clause, I have suggested as a basis of distinction (which, if not here stated for the first time, has not thus far been emphasized) that the question for consideration in each case is *for whose benefit such conduct or liability is to be regulated*; that there are at least three classes of persons for whose benefit it may be regarded as regulated: (1) the public; (2) those enjoying the benefit of transportation wholly within the State; (3) those enjoying the benefit of transportation within the scope of the commerce clause. The difficulty has chiefly arisen as to the third class, and in this connection I have contended throughout that *it is beyond the power of a State to regulate the conduct and liability of those engaged in transportation within the scope of the commerce clause, solely for the benefit of such class*. I have pointed out, however, that though for a time the decisions of the Supreme Court seemed to sanction this rule, as conspicuously, in the matter of rate regulation, yet, in view of later decisions of the court, the contrary, and in my view, utterly unsound rule, must be regarded as reasonably well established, at least as to certain classes of cases, though the court has, as it seems to me, failed to consistently apply it. Applying conversely to legislation by Congress the rule that I have contended for, the Safety Appliance Act of 1893, for instance, is within the constitutional power of Congress, as, indeed, it is established to be, while on the other hand the Employers' Liability Act of 1906 is not. (I here take no account of the particular ground on which the latter provision was recently held by the Su-

preme Court to be unconstitutional.) At any rate, it seems not yet to have been demonstrated that it is for the benefit of those enjoying the benefit of transportation within the scope of the commerce clause, that is, passengers or shippers.

I have freely, even severely, criticized views expressed by those doubtless far more likely than myself to reach correct conclusions in these matters. But I trust that, even if my conclusions be erroneous, a statement thereof may assist toward ascertainment of the truth. If in any instance my criticism has transgressed the bounds of propriety, I here take occasion to make my *amende honorable*.

“Not as adventitious therefore will the wise man regard the faith which is in him. The highest truth he sees he will fearlessly utter; knowing that, let what may come of it, he is thus playing his right part in the world — knowing that if he can effect the change he aims at — well: if not — well also, though not so well.”

FREDERICK H. COOKE.

52 William St., New York City, March, 1908.

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THE COMMERCE CLAUSE
OF THE
FEDERAL CONSTITUTION.

THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

CHAPTER I.

THE SUBJECT OF REGULATION.

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§ 1. Historical antecedents.

The conditions that led to the introduction of the commerce clause into the Federal Constitution cannot be better described than in the following language of one who, in addition to profound insight into the questions involved, enjoyed the advantage of being an interested contemporary observer of such conditions: "The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress."¹ Many years later it was said: "The

¹ Marshall, C. J., in *Brown v. Maryland*, 12 Wheat. 419, 445, 6 L. ed. 678 (1827). See also *Welton v. Missouri*, 91 U. S. 275, 280, 23 L. ed. 347 (Oct. 1875); *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015 (Oct. 1878); *County of Mobile v. Kimball*, 102 U. S. 691, 697, 26 L. ed. 238 (Oct. 1880); *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U. S. 557, 573, 7 Supm. 4, 11, 30

power of Congress to regulate commerce among the States is perhaps the most benign gift of the Constitution. Indeed it may be said that without it the Constitution would not have been adopted. One of the chief evils of the confederation was the power exercised by the commercial States of exacting duties upon the importation of goods destined for the interior of the country or for other States. The vast territory to the west of the Alleghenies had not yet been developed or subdivided into States, but the evil had already become so flagrant that it threatened an utter dissolution of the confederacy. The article was adopted that all of the States of the Union might have the benefit of the duties collected at the maritime ports, and to relieve them from the embarrassing restrictions imposed upon the internal commerce of the country.”² The report of the proceedings in the convention furnishes but little light for the interpretation of the clause. There does not appear to have been therein “any considerable (if, indeed, there was any) opposition to the

L. ed. 244 (1886); *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 498, 7 Supm. 592, 597, 30 L. ed. 694 (1887); *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 470, 14 Supm. 1125, 1130, 38 L. ed. 1047 (1894); *Northern Securities Co. v. U. S.*, 193 U. S. 197, 353, 24 Supm. 436, 463, 48 L. ed. 679 (1904); also facts stated in Mr. Webster’s argument in *Gibbons v. Ogden*, 9 Wheat. 1, 12, 6 L. ed. 23 (1824); and in opinion of Johnson, J. (9 Wheat. 224).

Of especial interest, as a decision so near the time of the adoption of the Constitution, is *U. S. v. The William*, 28 Fed. Cas. No. 16,700 (D. C. Mass., 1808).

See also as to conditions that led to the introduction of the commerce clause, paper by Mr. Madison in 5 Elliott’s Debates, pp. 109-122; 1 Story on the Constitution, §§ 259 *et seq.*, 1057; 2 Tucker on the Constitution, §§ 250-252; article in 24 Am. Law Rev. 25 (1890), by C. A. Culberson.

² *Cook v. Marshall County*, 196 U. S. 261, 272, 25 Supm. 233, 236, 49 L. ed. 471 (1905).

grant of the power. It was reported in the first draft of the Constitution exactly as it now stands, except that the words, 'and with the Indian tribes,' were afterwards added; and it passed without a division"³ in its present form: "*The Congress shall have Power*
** * * to regulate Commerce with foreign Nations,*
and among the several States, and with the Indian
Tribes."⁴

§ 2. Congress as the authority vested with the power to regulate.

It is "the Congress," as distinguished from the judicial and executive departments of the government, that is vested with the power to regulate. But it will be seen that judicial action that may not, strictly speaking, *regulate* commerce, may yet properly more or less directly affect it.⁵

§ 3. Judicial action in aid of power.

But, while the power to regulate is not vested in the judicial department, resort may be had thereto in aid of the power to regulate, thus, by way of relief against interference with carrying into effect legislation by Congress in pursuance of such power. The following has been stated as the rule applicable: "Every government, entrusted, by the very terms of

³ Story on the Constitution, § 1059. For account of proceedings in convention, see Elliott's Debates; Prentice & Egan's Commerce Clause, chap. 2; article in 24 Am. Law Rev. 25, *supra*.

⁴ Art. 1, § 8, clause 3.

⁵ As to the application of common-law principles to commerce within the scope of the commerce clause, see § 57.

In *Texas & Pacific Ry. Co. v. Interstate Transportation Co.*, 155 U. S. 585, 15 Supm. 228, 39 L. ed. 271 (1895), where relief was sought against injury to a bridge, the court disagreed with the proposition of the court below that "the relief asked for is in the nature of a regulation of commerce, such as could only be prescribed by Congress."

its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other."⁶

Such resort may be had in the absence of statutory provision, but *a fortiori* there can be no doubt of the power of Congress to directly provide therefor.⁷ Furthermore, even in the absence of legislation by Congress in pursuance of the power to regulate, such relief by way of judicial action has been granted against legislation by a State that is invalid as in conflict with the exclusive power of Congress in matters that are "in their nature national or admit only of one uniform system or plan of legislation."⁸ It is said that "in such cases the courts will interpose to prevent or redress the commission of acts done or attempted to be done under the authority of such unconstitutional laws."⁹

⁶ *Re Debs*, 158 U. S. 564, 584, 15 Supm. 900, 906, 39 L. ed. 1092 (1895), where, however, the relief allowed by injunction was against, not only obstruction of interstate transportation of persons and property, but also carriage of the mails. Congress had "by express statute" assumed jurisdiction over such commerce. 158 U. S. 586, 15 Supm. 907. See also *U. S. v. Debs*, 64 Fed. 724 (C. C. Ill., 1894); *Wabash R. Co. v. Hannahan*, 121 Fed. 563 (C. C. Mo. 1903); *Knudsen v. Benn*, 123 Fed. 636 (C. C. Minn., 1903).

⁷ *U. S. v. Debs*, 158 U. S. 581, 15 Supm. 905.

⁸ See § 56.

⁹ *Transportation Co. v. Parkersburg*, 107 U. S. 691, 701, 2 Supm. 732, 741, 27 L. ed. 584 (1883). Thus in *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 23 L. ed. 543 (Oct. 1875), one liable to a penalty by the terms of a State statute imposing restrictions in violation of the commerce clause, was allowed an injunction against action under such statute, in a suit brought "in order to test the validity of the provisions of" the act. But in *U. S. v. Railroad Bridge Co.*, 6 McLean, 517, 27 Fed. Cas. No. 16,114 (1855), on the application of the United States government, an injunction was refused against the construction of a railroad and bridges across the Mississippi river, it being said: "The judicial power

§ 4. Commerce defined.

Much of the difficulty and uncertainty involved in the application of the commerce clause has resulted from vagueness of conception of the precise scope of the term *commerce*. In its ordinary signification, justified by its etymology,¹⁰ it seems to not only comprehend, but to be confined to, cases of exchanges of property. Thus it is defined generally as “the *exchange of goods, productions or property of any kind*;”¹¹ “*interchange of goods, merchandise, or property of any kind; trade; traffic.*”¹²

As cases of barter are comparatively infrequent, and the great majority of exchanges of goods are exchanges for money, that is, *sales*, we may, for convenience sake, ignore other cases, and say broadly that commerce in its ordinary signification consists of *sales of property of any kind*. But we shall soon discover that the word as used in the commerce clause has radically departed from such signification, insomuch that it seems to have no necessary reference whatever to mere sales. Nor do we discover that any satisfactory definition answering to this changed signification has been authoritatively established. Perhaps the follow-

cannot precede that of legislation. The rule of action on all questions of policy, within the Federal powers, must be prescribed by Congress * * *. The commercial power is in Congress, but until it shall prescribe the rule, the power is dormant.” But this decision seems based on a failure to appreciate the rule referred to in the text as to the effect of inaction by Congress. And that such relief is proper, see elaborate opinion by Attorney-General Cushing, in *Waukegan Breakwater*, 6 Op. Atty.-Gen. 172 (1853).

That legislation by Congress is necessary for maintenance of a criminal proceeding, see *U. S. v. New Bedford Bridge*, 1 Woodb. & M. 401, 434, 27 Fed. Cas. No. 15,867, p. 102 (1847).

¹⁰ “*Com* —, together, + *merx* (*merci* —), goods, wares, merchandise.” Century Dictionary.

¹¹ Standard Dictionary.

¹² Century Dictionary.

ing definition is the one most approved: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and ✓ transit of persons and property, as well as the purchase, sale, and exchange of commodities."¹³ It is also said: "Commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph."¹⁴ But these loosely-worded definitions seem entirely inadequate. It will appear that commerce, in the sense now considered, but partially and imperfectly comprehends *intercourse*, and does not necessarily comprehend *traffic* at all, or the "purchase, sale, and exchange of commodities." Navigation, as a mere phase of transportation, may be here ignored. We shall, however, discover that commerce in this sense essentially consists in *transportation*, clearly including the transportation of persons and property, at least tangible property, generally. The scope of what is included in addition to persons and tangible property may not yet be clearly defined, but there is certainly included the transmission of intelligence under certain conditions.

We therefore submit the following definition of commerce, as the term is used in the commerce clause, leaving it to be hereafter justified in detail. *Commerce*

¹³ *County of Mobile v. Kimball*, 102 U. S. 691, 702, 26 L. ed. 238 (Oct. 1880). This was approvingly quoted in *McCall v. California*, 136 U. S. 104, 10 Supm. 881, 34 L. ed. 391 (1890); *Williams v. Fears*, 179 U. S. 270, 21 Supm. 128, 45 L. ed. 186 (1900); *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 351, 23 Supm. 321, 325, 47 L. ed. 492 (1903). To like effect, *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 241, 20 Supm. 96, 107, 44 L. ed. 136 (1899).

¹⁴ *Lottery Case (Champion v. Ames)*, 188 U. S. 352, 23 Supm. 325.

consists in transportation (not necessarily all transportation but certainly) including transportation of persons, tangible property, and (at least under certain conditions) of intelligence.

Although we submit this definition as being as nearly satisfactory as present conditions permit, it may well be that conditions hereafter developing will, like conditions that have already developed, call for a modification thereof. The means of transportation to which the commerce clause is now applicable are not limited to such as were "known or in use when the Constitution was adopted," but include new means brought into use from time to time "to meet the demands of increasing population and wealth."¹⁵ Indeed the means of transportation to which the commerce clause is now most conspicuously applied were unknown or not in use at the time when the Constitution was adopted.

§ 5. Commerce as including intercourse.

In escaping from the too narrow view that commerce, in the sense now considered, is limited to traffic or sales, refuge has been taken in the too broad view that it "is," or "consists in," or "embraces" intercourse.¹⁶ At any rate, the view that it otherwise than partially and imperfectly comprehends intercourse, is not justified by the course of the decisions.

¹⁵ *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. ed. 708 (Oct. 1877). See also *Re Debs*, 158 U. S. 564, 591, 15 Supm. 900, 909, 39 L. ed. 1092 (1895).

¹⁶ "Commerce is intercourse." *Gibbons v. Ogden*, 9 Wheat. 1, 189, 6 L. ed. 23 (1824); *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Supm. 249, 39 L. ed. 325 (1895). See *County of Mobile v. Kimball*, 102 U. S. 691, 702, 26 L. ed. 238 (Oct. 1880); *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 346, 23 Supm. 321, 323, 47 L. ed. 492 (1903). The same idea has elsewhere been frequently expressed.

It has sometimes been more narrowly defined as *commercial intercourse*,¹⁷ but this is merely an empty, unsatisfying definition in terms. *Intercourse* has been defined as including "communication between persons or places."¹⁸ This, literally interpreted, would obviously seem to include not merely contracts generally, but, for instance, correspondence and conversation. It will however presently appear that it does not include a mere contract, and much less would it seem to include correspondence or conversations. While then commerce undoubtedly includes a part of what is commonly known as *intercourse*, there has been established no satisfactory test of distinction between intercourse that is, and intercourse that is not, included.

§ 6. Commerce as including contracts.

As will hereafter be seen, a contract may be subject to the commerce clause merely because involving as a necessary incident what is, on independent grounds, clearly subject thereto, thus transportation of property.¹⁹ But, leaving such cases out of consideration, the question now is whether a mere contract between persons situate at the time, thus, in different States, is so subject. This would indeed seem literally within the definition of "intercourse" as "communication between persons." If the contract is effectuated by means of telegraphic or telephonic messages, it is, as elsewhere seen, subject to the commerce clause; at any rate, the transmission of the evidencing messages

¹⁷ Thus in *Gibbons v. Ogden*, *supra*; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 9, 24 L. ed. 708 (Oct. 1877); *U. S. v. E. C. Knight Co.*, *supra*; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 470, 14 Supm. 1125, 1130, 38 L. ed. 1047 (1894). See *Welton v. Missouri*, 91 U. S. 275, 280, 23 L. ed. 347 (Oct. 1875).

¹⁸ Century Dictionary.

¹⁹ See §§ 75, 75a.

is. But suppose two persons, though in different States, to be in such proximity that the contract may be effectuated by the voice, that is, by the transmission of sound through the atmosphere, instead of over wires. Or suppose it to be effectuated by writing transmitted by messenger. Should a different rule apply to such cases? On principle it is difficult to see why it should not, but certainly commerce, as the word is used in the commerce clause, does not, according to authoritative interpretation, include generally contracts between persons situate at the time in different States. This sufficiently appears from the decisions relating to insurance contracts,²⁰ which have largely influenced decisions applicable to contracts relating to other subjects.²¹ That is to say, to bring a contract

²⁰ See § 7.

²¹ In *Ex parte Martin*, 7 Nev. 140, 8 Am. Rep. 707 (1871), applying *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357 (Dec. 1868), was sustained a State statute requiring stamping of a bill of exchange drawn in the State, but payable in another. Compare *Fred Miller Brewing Co. v. Stevens*, 102 Iowa, 60, 71 N. W. 186 (1897). As to business of buying and selling foreign bills of exchange, see *Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 992 (Jan. T. 1850). See also Prentice & Egan's Commerce Clause, p. 48. Compare as to application of prohibition of art. 1, § 9, against a "tax or duty on articles exported from any State," to stamp tax on bill of lading, *Fairbank v. U. S.*, 181 U. S. 283, 21 Supm. 648, 45 L. ed. 862 (1901). As to taxation of instrument evidencing debt due resident from nonresident, see *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558 (Oct. 1879); *Atlanta Nat. Building & Loan Assoc. v. Stewart*, 109 Ga. 80, 87, 35 S. E. 73, 76 (1900). That the loaning of money by a foreign corporation is not subject to the commerce clause, see *Nelms v. Edinburg American Land Mortgage Co.*, 92 Ala. 157, 9 So. 141 (Nov. T. 1890). Compare *State v. Preferred Tontine Mercantile Co.*, 184 Mo. 160, 82 S. W. 1075 (1904). As to ownership of stock in corporation, see *Northern Securities Co. v. U. S.*, 193 U. S. 197, 334, 24 Supm. 436, 455, 48 L. ed. 679 (1904), and dissenting opinion of White, J. (193 U. S. 367, 24 Supm. 473). In *Catlin, etc. Co. v. Schuppert*, 130 Wis. 642, 110 N. W. 818 (1907), though the point was unnecessary to the de-

within the scope of the commerce clause, some other element must be involved, such as those elsewhere considered, transportation of property, or transmission of intelligence, as by telegraph.

§ 7. Contracts of insurance.

What has just been said is peculiarly applicable to the class of contracts that has attracted most attention in this connection, contracts of insurance between persons situate at the time in different States. As just said, this seems literally "intercourse," and it seems difficult to discover any satisfactory reason for excluding such contracts from the operation of the commerce clause. We here take no account of the circumstance that the contract commonly involves the interstate transportation of a tangible article, that is, a policy, evidencing the right "to the payment of a certain amount of money therein specified."²² We ignore the very persuasive argument that such transportation is of itself sufficient to bring the transaction within the scope of the commerce clause. What we desire to point out is that the prevailing rule that such contracts are not subject to the commerce clause was, in its origin at least, seemingly inconsistent with what will presently be seen to be the definition of commerce as not limited "to traffic, to buying and selling, or the

cision, there was thought to be within the scope of the commerce clause a contract whereby a resident purchased from a nonresident stock of a foreign corporation, to be transmitted into the State.

²² This is the very language used in *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 345, 23 Supm. 321, 322, 47 L. ed. 492 (1903), as applicable to lottery tickets, the transportation of which was here held to be included in "commerce" within the meaning of the commerce clause. The contention in the dissenting opinion (188 U. S. 367, 23 Supm. 331) that there is no distinction in this respect between a lottery ticket and an insurance policy seems unanswerable.

interchange of commodities."^{22a} On this point it suffices to quote the following language used in the leading authority on the subject:²³ "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These con-

^{22a} See § 9; articles in 39 Am. Law Rev. 182 (1905), by Edwin Maxey; 38 id. 181 (1904), by J. W. Walsh; 48 Am. Law Reg. (O. S.) 717 (1900), by R. H. Innes; in 5 Columbia Law Rev. 500 (1905), by C. F. Randolph.

²³ *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357 (Dec. 1868), a case of fire insurance. This doctrine has been frequently reaffirmed as applicable to different varieties of insurance, such as fire, life, and marine. See *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972 (Dec. 1870); *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 19 L. ed. 1029 (Dec. 1870); *Philadelphia Fire Assoc. v. New York*, 119 U. S. 110, 7 Supm. 108, 30 L. ed. 342 (1886); *Hooper v. California*, 155 U. S. 648, 15 Supm. 207, 39 L. ed. 297 (1895); *Noble v. Mitchell*, 164 U. S. 367, 17 Supm. 110, 41 L. ed. 472 (1896), affirming 100 Ala. 519, 14 So. 581, 25 L. R. A. 238 (Nov. T. 1893); *N. Y. Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Supm. 962, 44 L. ed. 1116 (1900); *Nutting v. Massachusetts*, 183 U. S. 553, 22 Supm. 238, 46 L. ed. 324 (1902). See *Allgeyer v. Louisiana*, 165 U. S. 578, 583, 17 Supm. 427, 41 L. ed. 832 (1897), reversing *State v. Allgeyer*, 48 La. Ann. 104, 18 So. 904 (1896); *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, 26 Supm. 619, 50 L. ed. 1013 (1906).

In some instances has been stated what seems not to be an altogether intelligible distinction, as here applied, that a contract of insurance is "*not an instrumentality of commerce, but a mere incident of commercial intercourse.*" *Nutting v. Massachusetts*, *supra*. To similar effect, *Hooper v. California*, *supra*; *Noble v. Mitchell*, *supra*.

For recognition or application of doctrine that the commerce clause does not apply to insurance, see *State v. Phipps*, 50 Kan. 609, 31 Pac. 1097, 18 L. R. A. 657, 34 Am. St. Rep. 152 (1893); *Fisher v. Insurance Co.*, 136 N. C. 217, 48 S. E. 667 (1904); *Insurance Co. of North America v. Commonwealth*, 87 Pa. St. 173, 30 Am. Rep. 352 (1878); *Hartford Fire Ins. Co. v. Perkins*, 125

tracts are not articles of commerce in any proper meaning of the word. *They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States.*” There seems no doubt that it is a necessary conclusion that regulation of the business of insurance under these conditions is beyond the power of Congress, so far as the commerce clause is concerned, though, in the absence of attempt at such regulation, there has been no occasion to directly determine the point. But the doctrine stated has been frequently applied in sustaining the power of a State to impose restrictions upon the transaction of such business, thus by foreign corporations.

§ 8. Contracts for personal services.

In accordance with what has already been said, it is clear enough that a contract for the performance of personal services at a given place is not subject to the commerce clause, merely because between persons situate at the time in different States, but neither is a

Fed. 502 (C. C. S. D., 1903); *People v. Thurber*, 13 Ill. 554, 558 (1852); *Phenix Ins. Co. v. Burdett*, 112 Ind. 204, 13 N. E. 705 (1887); *Adler-Weinberger S.S. Co. v. Rothschild*, 123 Fed. 145 (C. C. Pa., 1903); *Commonwealth v. Gregory*, 89 S. W. 168 (Ct. App. Ky., 1905).

In *People v. National Fire Ins. Co. of Hartford*, 27 Hun (N. Y.), 188 (1882), was sustained a tax upon premiums for insurance upon imports in bonded warehouses still in the original package.

contract of sale of tangible property, under like conditions. On the other hand, a contract of sale of tangible property may be subject to the commerce clause by reason of the performance thereof involving the transportation of such property to another State or country. It would seem to follow that a contract for the performance of personal services is likewise subject to the commerce clause, if performance thereof involves the transportation of the person whose services are contracted for to another State or country.²⁴ Furthermore the performance of such a contract may involve, not indeed the transportation of a person to perform the services, but of property upon which the services are to be performed. Such a contract seems likewise subject to the commerce clause.²⁵

²⁴ Scarcely sustainable seems *Williams v. Fears*, 179 U. S. 270, 21 Supm. 128, 45 L. ed. 186 (1900), affirming 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685 (1900), where the business of hiring laborers "to be employed beyond the limits of the State" was held not subject to the commerce clause, though concededly "transportation must eventually take place as the result of such contracts." See *Shepperd v. County Commrs. of Sumter*, 59 Ga. 535, 27 Am. Rep. 394 (1877). What is the distinction between this case and that of a contract of sale of personal property to be transported from one State to another, under consideration in *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Supm. 592, 30 L. ed. 694 (1887)? The court in *Williams v. Fears* seem to have been misled by the erroneous doctrine underlying *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357 (Dec. 1868), and other like decisions. See § 7.

Williams v. Fears was followed under like conditions in *State v. Napier*, 63 S. C. 60, 41 S. E. 13 (1902); *State v. Hunt*, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758 (1901). But in *Joseph v. Randolph*, 71 Ala. 499, 46 Am. Rep. 347 (Dec. T. 1882), was held invalid a license tax imposed for inducing laborers to leave certain localities "for the purpose of removing said laborers from this State."

²⁵ *Smith v. Jackson*, 103 Tenn. 673, 54 S. W. 981, 47 L. R. A. 416 (1899), seems open to substantially the same criticism as *Williams v. Fears*, *supra*, especially as *Paul v. Virginia* was princi-

§ 9. Traffic or sales.

As already stated, commerce in its ordinary signification consists of sales of property. It has been often said with reference to the use of the word in the commerce clause, that commerce "is" or "consists in" or "embraces" *traffic*²⁶ (which may be regarded as merely a synonym for sales).²⁷ But we regard as entirely fallacious the view that commerce, *in the sense now considered*, has any necessary reference whatever to *traffic* or sales. It seems to have been well said: "A sale is not the test of interstate commerce. All sales of sound articles of commerce, which necessitate the transportation of the goods sold from one State to another, are interstate commerce; but all interstate commerce is not sales of goods. Importation into one State from another is the indispensable element, the test, of interstate commerce."²⁸ Now com-

pally relied on. Here there was held not subject to the commerce clause the business of collecting soiled clothing and transporting it outside the State to be laundered and returned. See *Commonwealth v. Pearl Laundry Co.*, 105 Ky. 259, 49 S. W. 26 (1899).

²⁶ "Commerce undoubtedly is traffic." *Gibbons v. Ogden*, 9 Wheat. 1, 189, 6 L. ed. 23 (1824). See *County of Mobile v. Kimball*, 102 U. S. 691, 702, 26 L. ed. 238 (Oct. 1880); *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 346, 23 Supm. 321, 323, 47 L. ed. 492 (1903). The same idea has elsewhere been frequently expressed.

As to distinction between "trade" and "commerce," as the terms are used in the Federal anti-trust act, see *U. S. v. Patterson*, 55 Fed. 605 (C. C. Mass., 1893); *Re Grand Jury*, 62 Fed. 840 (D. C. Cal., 1894); *U. S. v. Debs*, 64 Fed. 724, 749 (C. C. Ill., 1894); *U. S. v. Cassidy*, 67 Fed. 698, 705 (D. C. Cal., 1895); *U. S. v. Coal Dealers' Assoc.*, 85 Fed. 252, 265 (C. C. Cal., 1898).

²⁷ "Traffic" is defined as "an interchange of goods, merchandise, or property." *Century Dictionary*.

²⁸ *Butler Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, 17 (C. C. A., 8th C. 1907), holding within the scope of the commerce clause consignment of goods under contracts that "did not evidence sales of the goods," being "factorage contracts."

merce, in the sense now considered, is confined to commerce “*with foreign nations, and among the several States, and with the Indian tribes.*”²⁹ But obviously the mere sale of property situate within a State has no *necessary* relation to commerce with another region. Commonly indeed the sale of personal property is followed by its transportation, but it may well continue indefinitely in the same situation, as in case of household furniture or agricultural utensils sold to a succeeding tenant. It may indeed, as an incident of the sale, be transported to another State or country, and thus come within the scope of the commerce clause, but this results from the nonessential element of transportation and not from the sale.³⁰ Yet underneath many decisions lurks the fallacy that a *sale* is an essential³¹ element of commerce, within the meaning of the commerce clause. It has, however, long been established that, in any view, commerce in the sense now considered is not *limited* “to traffic, to buying and selling, or the interchange of commodities,” it being said:³² “This would restrict a general term,

²⁹ It is to be noted, however, that as to commerce with the Indian tribes the power has, as a matter of supposed practical necessity, it would seem, been more broadly construed than here indicated. See § 30.

³⁰ In *N. Y. ex rel. Hatch v. Reardon*, 204 U. S. 152, 27 Supm. 188, 51 L. ed. 415 (1907), affirming *People ex rel. Hatch v. Reardon*, 184 N. Y. 431, 77 N. E. 970, 8 L. R. A. N. S. 314, 112 Am. St. Rep. 628 (1906), a mere sale of stock in a corporation of another State was held not within the commerce clause, it making no difference that the parties to the sale were nonresidents.

³¹ Thus notably in the decisions excluding contracts of insurance from the operation of the commerce clause. See § 7. Such fallacy was conspicuously manifest in, for instance, *Smith v. Jackson*, 103 Tenn. 673, 54 S. W. 981, 47 L. R. A. 416 (1899), and *Williams v. Fears*, 179 U. S. 270, 21 Supm. 128, 45 L. ed. 186 (1900), seems to be a like instance. See § 8.

³² *Gibbons v. Ogden*, *supra*.

applicable to many objects, to one of its significations.”

§ 10. Transportation of property.

Having thus seen what commerce, in the sense now considered, *does not include* or does not necessarily include, we are prepared to more clearly see what it *does include*. As already indicated, it essentially consists in *transportation*,³³ and questions of its application have more usually arisen with reference to property than to persons. It has never been doubted that it applies to such transportation when an incident of a sale or other exchange,³⁴ but it clearly includes transportation independently of whether or not there is a sale, thus in case of transportation for others as an independent business, “irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.”³⁵ And so, it would seem, of transportation by a person of his own property for his own

³³ See *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527 (Oct. 1877), where it was said that “transportation is essential to commerce, or rather it is commerce itself.” See also *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505, 569, 19 Supm. 25, 31, 43 L. ed. 259 (1898); *People ex rel. Hatch v. Reardon*, 184 N. Y. 431, 452, 77 N. E. 970, 977, 8 L. R. A. N. S. 314, 324, 112 Am. St. Rep. 628 (1906); *Butler Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, 17 (C. C. A., 8th C. 1907).

³⁴ *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 479, 8 Supm. 689, 695, 31 L. ed. 700 (1888), citing *State Freight Tax Cases*, 15 Wall. 232, 275, 279, 21 L. ed. 146 (Dec. 1872).

³⁵ *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617, 23 Supm. 214, 47 L. ed. 333 (1903). See also *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 23 Supm. 321, 47 L. ed. 492 (1903). Thus in *State v. Lowry*, 166 Ind. 372, 77 N. E. 728, 4 L. R. A. N. S. 528 (1906), as to cigarettes intended for personal use, but not for sale. So in *Stubbs v. People*, 90 Pac. 11, 14 (Supm. Ct. Colo., 1907), as to horses used while still the property of the importer. See article in 4 Mich. Law Rev. 124 (1905), by T. A. Sims. As to intoxicating liquors see § 99.

use.³⁶ It may not be entirely clear what is included in the term "property" thus the subject of commerce, but there seems no reason to doubt that there are at least included "things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money."³⁷ As elsewhere seen, the provisions of the commerce clause have been frequently applied to such particular means of transportation of property as railroads,³⁸ bridges,³⁹ ferries,⁴⁰ and vessels.

§ 11. Transportation of persons.

Of course human beings are not, under conditions of freedom,⁴¹ the subjects of sale, so that transportation

³⁶ So held in *State v. Holleyman*, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567 (1899), of transportation by a person of liquor for his own personal use, in the absence of any contract for transportation.

³⁷ So stated in *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 345, 23 Supm. 321, 322, 47 L. ed. 492 (1903), where, however, it was intimated that more than this is included. There were here held to be included, lottery tickets carried from State to State by "independent carriers," and "entitling the holder to the payment of a certain amount of money therein specified." See also *Francis v. U. S.*, 188 U. S. 375, 23 Supm. 334, 47 L. ed. 508 (1903). As to what are articles of commerce with reference to the exercise of the police power of the States, see § 88.

³⁸ *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 312, 325, 17 Supm. 540, 548, 553, 41 L. ed. 1007 (1897); *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617, 23 Supm. 214, 47 L. ed. 333 (1903); *Northern Securities Co. v. U. S.*, 193 U. S. 197, 353, 24 Supm. 436, 463, 48 L. ed. 679 (1904). See *Sweatt v. Boston, H. & E. R. Co.*, 3 Cliff. 339, 23 Fed. Cas. No. 13,684 (1871).

³⁹ *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 218, 14 Supm. 1087, 1092, 38 L. ed. 962 (1894).

⁴⁰ Thus across the Delaware river, between New Jersey and Pennsylvania. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 5 Supm. 826, 828, 29 L. ed. 158 (1885). So across the Hudson, between New York and New Jersey. *People ex rel. Pennsylvania R. R. Co. v. Wemple*, 138 N. Y. 1, 33 N. E. 720, 19 L. R. A. 694 (1893).

⁴¹ The application of the commerce clause to conditions of

of them would be included in commerce, in its ordinary signification already considered. But nothing is better established than that commerce, in the sense now considered, includes transportation of persons, as well as of property.⁴²

§ 12. Transportation (or transmission) of intelligence; e. g., by telegraph or telephone.

Although the method of transmission or transportation⁴³ of intelligence by means of the electric telegraph was not known at the time of the adoption of the Constitution, there was no hesitation in applying the commerce clause to such method, and it is well established that it applies to communication by means of telegraph,⁴⁴ as well as by telephone,⁴⁵ though of course

slavery is happily now of little practical importance. Congress was held to have power to prohibit the foreign slave trade, in *U. S. v. Gould*, 25 Fed. Cas. No. 15,230 (D. C. Ala., 1860). For a minute account of congressional legislation as to the slave trade, see *Charge to Grand Jury*, 30 Fed. Cas. No. 18,269a (C. C. Ga., 1859).

⁴² *Gibbons v. Ogden*, 9 Wheat. 1, 215, 6 L. ed. 23 (1824); *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 23 L. ed. 543 (Oct. 1875); *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 352, 23 Supm. 321, 325, 47 L. ed. 492 (1903). See 2 Tucker on the Constitution, § 254.

⁴³ Although the word "transmission" is doubtless more appropriate than "transportation," as applied to communication by telegraph or telephone, the latter is here employed for the sake of uniformity.

⁴⁴ *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. ed. 708 (Oct. 1877); *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Supm. 1126, 30 L. ed. 1187 (1887); *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Supm. 1380, 32 L. ed. 311 (1888); *Western Union Tel. Co. v. James*, 162 U. S. 650, 654, 16 Supm. 934, 935, 40 L. ed. 1105 (1896); *Western Union Tel. Co. v. Atlantic & Pacific States Tel. Co.*, 5 Nev. 102 (1869). See in *Western Union Tel. Co. v. Pendleton*, pointed out certain peculiar characteristics of communication by telegraph, as compared with other commerce.

⁴⁵ See *Central Union Tel. Co. v. State*, 118 Ind. 194, 19 N. E.

there is here no transportation of tangible property.⁴⁶ The extension of the provisions of the commerce clause to these cases makes it, as already suggested, more difficult to see the propriety of disallowing its application to other cases of communication, where there is involved no transportation of tangible property,⁴⁷ thus effectuation of a contract, as by correspondence between persons situated in different States.

§ 13. Transportation by water; i. e., navigation.

For a long period after the Constitution took effect, the present customary methods of extensive transportation by land were unknown, and the commerce clause was first conspicuously applied to transportation by water, that is, navigation, rather than to transportation by land, it never having been seriously doubted that it

604, 10 Am. St. Rep. 114 (1889); *Matter of Pennsylvania Tel. Co.*, 48 N. J. Eq. 91, 20 Atl. 846, 27 Am. St. Rep. 462 (1891); *Muskogee Nat. Tel. Co. v. Hall*, 118 Fed. 382, 55 C. C. A. 208 (8th C. 1902).

⁴⁶ See *Western Union Tel. Co. v. Pendleton*, *supra*. See also *Michigan Tel. Co. v. City of Charlotte*, 93 Fed. 11 (C. C. Mich., 1899).

⁴⁷ In *State v. Morgan*, 2 S. D. 32, 51, 48 N. W. 314, 320 (1891), the business of a mercantile agency in receiving information from, and communicating it to persons in other States, was held not subject to the commerce clause. Would it have made any difference, had it appeared that it was received and communicated wholly by telegraph or telephone? In *International Text-Book Co. v. Peterson*, 113 N. W. 730 (Supm. Ct. Wis., 1907), was held not subject thereto, furnishing of instruction by correspondence to a person in another State, though there was involved the transportation of tangible articles, that is, "instruction papers, examination questions, and drawing plates," these being said to be "not objects of sale, barter, or exchange, but instrumentalities through which" the instruction was imparted. The rule established as to insurance contracts was applied as controlling. See *International Text-Book Co. v. Inhabitants of Auburn*, 155 Fed. 986 (C. C. Me., 1907), involving same state of facts.

includes navigation.⁴⁸ So far as the power to regulate is concerned, there appears to be no distinction between transportation by water and by land. "The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other."⁴⁹

§ 14. Transportation along navigable waters within limits of State.

It having been seen that the subject of regulation includes navigation, it necessarily follows that there

⁴⁸ *Gibbons v. Ogden*, 9 Wheat. 1, 190, 6 L. ed. 23 (1824); *U. S. v. Coombs*, 12 Pet. 72, 9 L. ed. 1004 (Jan. T. 1838); *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996 (Dec. T. 1851); *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96 (Dec. 1865); *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 23 L. ed. 543 (Oct. 1875); *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. ed. 224 (Oct. 1880); *County of Mobile v. Kimball*, 102 U. S. 691, 702, 26 L. ed. 238 (Oct. 1880); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 5 Supm. 826, 828, 29 L. ed. 158 (1885); *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 352, 23 Supm. 321, 325, 47 L. ed. 492 (1903).

In the early decision in *The Wilson*, 1 Brock. 423, 30 Fed. Cas. No. 17,846 (1820; Marshall, J.), an act providing for the condemnation of a vessel had been referred to such power.

As to navigable rivers within public lands, see U. S. R. S., § 2476. For numerous provisions as to navigable waters and the use thereof, see under the title "Rivers, Harbors, and Canals," in Federal Statutes Annotated.

⁴⁹ *Re Debs*, 158 U. S. 564, 590, 15 Supm. 900, 909, 39 L. ed. 1092 (1895). See, however, as to distinction between commerce on land and commerce on water, "in reference to the respective constitutional powers and duties of the State and Federal governments," *Railroad Co. v. Maryland*, 21 Wall. 456, 22 L. ed. 678 (Oct. 1874).

is included navigation along navigable waters within the limits of a State.⁵⁰ It is established that there is included the control of what are commonly known as "navigable waters of the United States," in contradistinction from "navigable waters of the States,"⁵¹ the former including such waters, even though wholly within the limits of a State, as form "in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."⁵² Nor is such power of

⁵⁰ This doctrine, substantially stated in *Gibbons v. Ogden*, 9 Wheat. 1, 193, 197, 6 L. ed. 23 (1824), has been generally accepted. Here New York statutes conferring the exclusive right to navigate the waters of the State with boats moved by steam were held invalid, as against the right of a vessel licensed under an act of Congress to carry on the coasting trade. Such vessel was engaged in navigation between a point within and a point without the State. As to stream constituting boundary between States, see *State v. Munice Pulp Co.*, 104 S. W. 437, 449 (Supm. Ct. Tenn., 1907).

⁵¹ *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999 (Dec. 1870); *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Supm. 185, 27 L. ed. 442 (1883); *Miller v. Mayor of N. Y.*, 109 U. S. 385, 3 Supm. 228, 27 L. ed. 971 (1883); *Leovy v. U. S.*, 177 U. S. 621, 632, 20 Supm. 797, 801, 44 L. ed. 914 (1900).

⁵² *The Daniel Ball*, *supra*, and other decisions, *infra*. It was said in *Leovy v. U. S.*, *supra*, that "the term 'navigable waters of the United States,' has reference to commerce of a substantial and permanent character to be conducted thereon." See comments thereon in *U. S. v. Wishkah Boom Co.*, 136 Fed. 42, 68 C. C. A. 592 (9th C. 1905). By the test stated in the text was held to be a navigable water of the United States, the Grand River in Michigan, a stream capable of bearing a steamer of 123 tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan, and by its junction with the lake, forming a continued highway for commerce, both with other States and with foreign countries. *The Daniel Ball*, *supra*. And so the Chicago River in Illinois, and its

Congress limited by the doctrine of the common law as to navigability, which has no application in this country.⁵³ "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."⁵⁴

branches. *Escanaba Co. v. Chicago*, *supra*; *Harman v. Chicago*, 147 U. S. 396, 13 Supm. 306, 37 L. ed. 216 (1893), reversing 140 Ill. 374, 29 N. E. 732 (1892). And so the East River in New York. *Miller v. Mayor of N. Y.*, *supra*. And so a canal wholly within Illinois, connecting Lake Michigan and the Chicago River with the Illinois and Mississippi Rivers. *Ex parte Boyer*, 109 U. S. 629, 3 Supm. 434, 27 L. ed. 1056 (1884). See also *The Montello*, 20 Wall. 430, 22 L. ed. 391 (Oct. 1874). And so Jamaica Bay in New York, an inlet of the Atlantic ocean. *The Hazel Kirke*, 25 Fed. 601 (C. C. N. Y., 1885). The Detroit River. *Grand Trunk Ry. Co. v. Backus*, 46 Fed. 211 (C. C. Mich., 1891). The Allegheny River. *U. S. v. Union Bridge Co.*, 143 Fed. 377 (D. C. Pa., 1906). See also *Frost v. Washington County R. R. Co.*, 96 Me. 76, 51 Atl. 806, 59 L. R. A. 68 (1901). For instances of rivers within a State held included. see *U. S. v. City of Moline*, 82 Fed. 592 (D. C. Ill., 1897); *U. S. v. Wishkah Boom Co.*, 136 Fed. 42, 68 C. C. A. 592 (9th C. 1905).

But held otherwise of a creek setting back from a river, in *Groton v. Hurlburt*, 22 Conn. 178, 186 (1852). See *Wethersfield v. Humphrey*, 20 Conn. 218 (1850). As to creeks permeating marshes, see *Chisolm v. Caines*, 67 Fed. 285 (C. C. S. C., 1894); *Glover v. Powell*, 10 N. J. Eq. 211 (1854). As to bays, inlets, and small streams on southern shore of Long Island connecting with ocean, see *U. S. v. Banister Realty Co.*, 155 Fed. 583 (C. C. N. Y., 1907).

⁵³ *The Daniel Ball*, *supra*; *Escanaba Co. v. Chicago*, *supra*. It was here pointed out how the common test, that is, by the ebb and flow of the tide, grew out of conditions that do not exist in this country.

⁵⁴ *The Daniel Ball*, *supra*; *The Montello*, *supra*; *U. S. v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 698, 19 Supm. 770, 773, 43 L. ed. 1136 (1899). See generally as to when a stream is navigable, 1 Farnham on Waters, § 3.

Nor does the mere temporary interruption of navigation of what is otherwise a navigable water, destroy its character as such.⁵⁵ But it seems reasonably clear that such power does not, save so far as may be necessary for the control of transportation along the navigable portion of a stream, extend to a nonnavigable portion thereof, thus, the portion above the navigable portion, and that "ceases to be a public highway for commerce."⁵⁶

§ 15. Commencement of transportation.

The question when transportation within the scope of the commerce clause has in any given case *commenced*, has usually arisen in connection with the exercise of the power of taxation under State authority, and will be considered at length in connection with that subject.⁵⁷ On principle there would seem to be no distinction in this respect between cases of taxation and other cases involving the application of the commerce clause, but this conclusion may be less certain, in view of the circumstance presently to be considered, that such a distinction is recognized as applicable to *termination* of transportation.⁵⁸

⁵⁵ *The Cheeseman v. Two Ferryboats*, 2 Bond, 363, 5 Fed. Cas. No. 2,633 (1870), citing *Nelson v. Leland*, 22 How. 48, 16 L. ed. 269 (Dec. T. 1859).

⁵⁶ *Neaderhouser v. State*, 28 Ind. 257 (1867).

⁵⁷ See § 109.

⁵⁸ Thus in *Tredway v. Riley*, 32 Neb. 495, 49 N. W. 268, 29 Am. St. Rep. 447 (1891), in holding a statute prohibiting the manufacture and sale of liquors, applicable to sale and delivery within the State, though for the purpose of transportation and sale out of the State, there was applied the doctrine also applied in cases of taxation, as to when transportation has commenced, citing *The Daniel Ball*, 10 Wall. 557, 565, 19 L. ed. 999 (Dec. 1870); *Coe v. Errol*, 116 U. S. 517, 6 Supm. 475, 29 L. ed. 715 (1886). In *Larabee Flour Mills Co. v. Missouri Pacific Ry. Co.*, 74 Kan. 808, 88 Pac. 72 (1906), the mere intention to use cars for purpose of transportation within the scope of the commerce clause was held insufficient to bring them while empty within the scope of the clause.

§ 16. Termination of transportation.

It would seem reasonably clear on principle that, as in case of transportation generally, transportation within the scope of the commerce clause terminates in any given case, upon the arrival of the person or property in question at *its final destination*, a fact ordinarily not difficult to determine. And, as elsewhere seen, this is precisely the rule established with reference to *taxation of property*.⁵⁹ But, with what seems to us to be a glaring inconsistency, there has been interpolated the “*original package*” doctrine presently to be considered.

§ 17. The “original package” doctrine.

According to the anomalous, and it seems to us not improper to say, the absurd “*original package*” doctrine, “transportation” of property within the scope of the commerce clause continues even after arrival at its final destination. The term “original package” is said to be simply “a convenient form of expression adopted⁶⁰ to indicate that a license tax

⁵⁹ See § 110. In *Standard Oil Co. v. State*, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. N. S. 1015 (1907), transportation was held to have terminated for the purpose of giving effect to State anti-trust legislation.

⁶⁰ By Marshall, C. J., in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678 (1827), which was, however, a case of importation from a foreign country, the decision not necessarily resting, it would seem, on the commerce clause, but rather on the prohibition against laying any imposts or duties on imports. It seems to us unfortunate that so much weight has been allowed to so early a decision, rendered when the scope of the commerce clause was so imperfectly understood. *Brown v. Maryland* was followed as applicable to imports from foreign countries, in *State v. Shapleigh*, 27 Mo. 344 (1858). See *State v. Wade*, 63 Vt. 80, 22 Atl. 12 (1890).

As to contracts for sale of property remaining in original package, see § 77.

See attack on doctrine in 35 Am. Law Rev. 364 (1901), by

could not be exacted of an importer of goods from a foreign country who disposes of such goods in the form in which they were imported.”⁶¹ The doctrine was thus expressed in a well-known passage: “There must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. * * * It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in *the original form or package* in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.”⁶²

More recently it has been thus stated: “The settled doctrine is that the power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any State regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the State.”⁶³ This seems to us about as

Shackelford Miller, and reply in *Id.* 669 (1901), by M. M. Townley. See generally elaborate article in 29 *Am. Law Reg.* (N. S.) 409, 721, 797 (1890), by J. B. Uhle.

⁶¹ *Cook v. Marshall County*, 196 U. S. 261, 25 Supm. 233, 49 L. ed. 471 (1905).

⁶² *Brown v. Maryland*, *supra*.

⁶³ *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 18 Supm. 674, 42 L. ed. 1100 (1898). As to transportation of cattle in-

reasonable as to hold that an interstate passenger continues "under the shelter of the commerce clause" until, by a change from his traveling raiment, he has "been commingled with the general mass of *population* in the State."⁶⁴ It will be hereafter seen that the doctrine has been distinctly repudiated in its application to ordinary taxation,⁶⁵ nor does there appear to be any satisfactory reason why it should not likewise be repudiated utterly.

§ 17a. *Leisy v. Hardin*.⁶⁶

An Iowa statute prohibiting the sale of intoxicating liquors was held unconstitutional as applied to beer manufactured in another State, and there put up in

cluding sale on arrival at destination, see *Swift v. U. S.*, 196 U. S. 375, 398, 25 Supm. 276, 280, 49 L. ed. 518 (1905), involving effect of Federal anti-trust act. In *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Supm. 159, 51 L. ed. 295 (1906), in case of transportation into the State for the purpose of performing a contract of sale, it was said: "The doctrine as to original packages primarily concerns the right to sell within the prohibiting or taxing State goods coming into it from outside. When the goods have been sold before arrival the limitations that still may be found to the power of the State will be due, generally, at least, to other reasons."

As to application of doctrine to goods intended, not for sale, but for personal use, see *State v. Lowry*, 166 Ind. 372, 77 N. E. 728, 4 L. R. A. N. S. 528 (1906), which was applied in *Stubbs v. People*, 90 Pac. 1114 (Supm. Ct. Colo., 1907), in holding invalid a restriction upon the use of horses while still the property of the importer. See as to such use by another person than the importer.

⁶⁴ In *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 23 L. ed. 543 (Oct. 1875), it was regarded as unnecessary "to consider at what period after his arrival the passenger himself passes from the sole protection of the Constitution, laws, and treaties of the United States, and becomes subject to such laws as the State may rightfully pass," as in case of transportation of property. See also *People v. Naglee*, 1 Cal. 232, 52 Am. Dec. 312 (1850).

⁶⁵ See § 110.

⁶⁶ 135 U. S. 100, 10 Supm. 681, 34 L. ed. 128 (1890), reversing

sealed kegs and cases, being thereafter brought into Iowa, and there sold in such kegs and cases before they were broken or opened. It was held that the importers had not only the right to import the beer into the

Iowa, 78 Iowa, 286, 43 N. W. 188 (1889). This was followed in *Lyng v. Michigan*, 135 U. S. 161, 10 Supm. 725, 34 L. ed. 130 (1890), in holding unconstitutional a statute imposing a tax upon the business of selling liquors, as applied to sale in the original package of liquor imported from another State. The point above decided had been discussed, but left undecided, in *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 499, 8 Supm. 689, 706, 31 L. ed. 700 (1888), as to the effect of which, see *Leisy v. Hardin* (135 U. S. 111, 10 Supm. 685), where it was said that "although the precise question before us was not ruled in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23 (1824), and *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678 (1827), yet we think it was virtually involved and answered, and that this is demonstrated, among other cases, in *Bowman v. Chicago & Northwestern Ry. Co.*" On this point *The License Cases* (*Pierce v. New Hampshire*), 5 How. 504, 12 L. ed. 256 (Jan. T. 1847), decided on a substantially identical state of facts, was overruled in *Leisy v. Hardin*. For discussions of the effect of *The License Cases*, see *State v. Wheeler*, 25 Conn. 290 (1856); *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487 (1855). The doctrine of *Leisy v. Hardin* was applied in *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Supm. 757, 43 L. ed. 49 (1898), to a Pennsylvania statute prohibiting the manufacture or sale of oleomargarine.

Leisy v. Hardin was followed under the statutes of Iowa, the State in which it originated, in *State v. Pfeajor*, 81 Iowa, 759, 46 N. W. 1063 (1890); *State v. Corrick*, 82 Iowa, 451, 48 N. W. 808 (1891); *Wind v. Her*, 93 Iowa, 316, 61 N. W. 1001, 27 L. R. A. 219 (1895). And there seem overruled *Collins v. Hills*, 77 Iowa, 181, 41 N. W. 571, 3 L. R. A. 110 (1889); *Grousendorf v. Howat*, 77 Iowa, 187, 41 N. W. 573 (1889); *State v. Bowman*, 78 Iowa, 519, 43 N. W. 302 (1889); *State v. Zimmerman*, 78 Iowa, 614, 43 N. W. 458 (1889); *State v. Bowman*, 79 Iowa, 566, 44 N. W. 813 (1890).

Contrary to the now established doctrine seem *Re May*, 82 Fed. 422 (C. C. Mont., 1897); *State v. Gurney*, 37 Me. 149 (1853); *State v. Blackwell*, 65 Me. 556 (1876); *State v. Fulker*, 43 Kan. 237, 22 Pac. 1020, 7 L. R. A. 183 (1890). And of doubtful authority seems *Ex parte Brown*, 48 Fed. 435 (D. C. N. C., 1891),

State, but also "the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or nonresident importer." Though the original package doctrine has no necessary reference to intoxicating liquors as distinguished from other tangible property, it has been more frequently applied thereto.⁶⁷

sustaining the imposition, in addition to an "*ad valorem* tax" on stock, of payment "as a license tax," of a percentage "on the total amount of purchases in or out of the State," as applied to goods imported from another State and still in the original packages.

Of doubtful propriety may have been the application of the doctrine in *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241 (1896), in holding an agreement for the sale of property contracted to be transported into the State, invalid under the State anti-trust act, because of it being provided in such agreement that the buyer should not sell or be interested in the sale of any beer not manufactured by the seller, who in turn agreed not to sell or assign any beer of its manufacture to any other party at the place of residence of the buyer.

In *Preston v. Finley*, 72 Fed. 850 (C. C. Tex., 1896), was sustained a license tax for the sale of newspapers printed outside the State and brought therein by mail, though "each separate copy," before being mailed, was "separately folded, and constituted a separate, original, and complete package in itself, and was so delivered and sold" in the State. The court seem to have overlooked the distinction between a tax imposed as a condition of transacting interstate business, and a tax on the property of one engaged in such business.

For early decisions, now generally of little authority, see *Dorman v. State*, 34 Ala. 216, 245 (1859); *Hinson v. Lott*, 40 Ala. 123 (1866), affirmed in 8 Wall. 148, 19 L. ed. 387 (Dec. 1868); *State v. Peckham*, 3 R. I. 289 (1838); *Jones v. Hard*, 32 Vt. 481 (1860).

⁶⁷ Thus in *Re Beine*, 42 Fed. 545 (C. C. Kan., 1890); *State v. Burns*, 82 Me. 558, 19 Atl. 913 (1890); *State v. Intoxicating*

§ 18. Breaking of original package.

While then, according to the "original package doctrine," transportation within the scope of the commerce clause continues until sale in the original package, such transportation nevertheless terminates upon breaking of the original package before sale, thus in the ordinary case of boxes, cases, or bales being opened and separate packages therein removed, before being sold.⁶⁸ In such case there obviously re-

Liquors, 83 Me. 158, 21 Atl. 840 (1891); *Carstairs v. O'Donnell*, 154 Mass. 357, 28 N. E. 271 (1891); *Doherty v. Cotter*, 68 N. H. 37, 38 Atl. 499 (1894); *Yeartean v. Bacon*, 65 Vt. 516, 27 Atl. 198 (1892). It was applied to cigarettes, in *Re Minor*, 69 Fed. 233 (C. C. W. Va., 1895); *Sawrie v. State of Tennessee*, 82 Fed. 615 (C. C. Tenn., 1897); *State v. Lowry*, 166 Ind. 372, 77 N. E. 728, 4 L. R. A. N. S. 528 (1906). To oleomargarine, in *Schollenberger v. Pennsylvania*, *supra*; *Re Gooch*, 44 Fed. 276, 10 L. R. A. 830 (C. C. Minn., 1890); *Re McAllister*, 51 Fed. 282 (C. C. Md., 1892). To a carload of potatoes sold in bulk, in *City of Buffalo v. Reavey*, 37 App. Div. 228, 55 N. Y. Suppl. 792 (1899).

⁶⁸ Under such conditions goods were held to have become commingled with the general mass of property in the State, so as to be no longer within the protection of the commerce clause, in *May v. New Orleans*, 178 U. S. 496, 20 Supm. 976, 44 L. ed. 1165 (1900), affirming 51 La. Ann. 1064, 25 So. 959 (1899). To similar effect, *Re Pringle*, 67 Kan. 364, 72 Pac. 864 (1903); *People v. Wilmerding*, 62 Hun. 391, 17 N. Y. Suppl. 102 (1891); *Kimmell v. State*, 104 Tenn. 184, 56 S. W. 854 (1900); *Croy v. Obion County*, 104 Tenn. 525, 58 S. W. 235, 51 L. R. A. 254, 78 Am. St. Rep. 931 (1900). So of the sale of oleomargarine by the pound out of a ten-pound tub. *Commonwealth v. Paul*, 148 Pa. St. 559, 24 Atl. 78 (1892). So in case of bundles of brooms separated before delivery to different purchasers. *Commonwealth v. Rearick*, 26 Pa. Super. 384 (1904), reversed, however, in *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Supm. 159, 51 L. ed. 295 (1906). For other instances of recognition of the general rule, see *State v. Montgomery*, 92 Me. 433, 43 Atl. 13 (1899); *Commonwealth v. Kimball*, 24 Pick. (Mass.) 359, 35 Am. Dec. 326 (1837); *People ex rel. Matheson v. Roberts*, 158 N. Y. 162, 52 N. E. 1102 (1899); *Commonwealth v. Harmel*, 166 Pa. St. 89, 30 Atl. 1036, 27 L. R. A. 388 (1895); *Tracy v. State*, 3 Mo. 3 (1829); *State v. David-*

mains no original package for the doctrine to operate upon. An exception to the rule just stated is allowed, however, in case of breaking of the package merely to enable the buyer to inspect the goods in question.⁶⁹

§ 19. Sale in original package.

As already noticed, it is *a sale in the original package*⁷⁰ that terminates transportation within the scope of the commerce clause, though thereafter the original package may remain unbroken.⁷¹ It seems scarcely

son, 50 La. Ann. 1297, 24 So. 324, 69 Am. St. Rep. 478 (1898); *Re Wilson*, 8 Mackey (D. C.), 341, 12 L. R. A. 624 (1890). In *Hopkins v. Lewis*, 84 Iowa, 690, 51 N. W. 255, 15 L. R. A. 397 (1892), a sale of an imported bottle of liquor in a saloon was held not in the original package, the liquor being poured into glasses furnished by the seller upon a counter, and the seller retaining the bottle. As to effect of selling separately packages shipped in carload lots, see *Laseter v. Purcell Mill & Elevator Co.*, 22 Tex. Civ. App. 33, 54 S. W. 425 (1899), explaining *Leisy v. Hardin*; *Western Paper Bag Co. v. Johnson*, 38 S. W. 364 (Tex. Civ. App. 1896). As to goods intended not for sale, but for personal use, see *State v. Lowry*, 166 Ind. 372, 77 N. E. 728, 4 L. R. A. N. S. 528 (1906).

⁶⁹ Thus, of removing the lid of a package of oleomargarine, *Re McAllister*, 51 Fed. 282 (C. C. Md., 1892); of opening a barrel of liquor, *Wind v. Iler*, 93 Iowa, 316, 61 N. W. 1001, 27 L. R. A. 219 (1895); a bale of goods, *Greek-American Sponge Co. v. Richardson Drug Co.*, 124 Wis. 469, 102 N. W. 888, 109 Am. St. Rep. 961 (1905).

In *Wasserboehr v. Boulter*, 84 Me. 165, 24 Atl. 808, 30 Am. St. Rep. 344 (1892), however, in denying recovery for liquors sold and transported into the State, the contract was held not sustainable as "a sale in original packages," being conditional, the purchaser having thereby the right of breaking and examining such packages.

⁷⁰ In a prosecution for the illegal sale of liquors, the burden was held to be on the defendant to show that the sale was in an original package. *Tinker v. State*, 96 Ala. 115, 11 So. 383 (Nov. T. 1891-92); *Keith v. State*, 91 Ala. 2, 8 So. 353, 10 L. R. A. 430 (Nov. T. 1890); *State v. Gurney*, 37 Me. 149 (1853).

⁷¹ Thus, in *Waring v. Mayor*, 8 Wall. 110, 19 L. ed. 342 (Dec. 1868), affirming *Mayor, etc., of Mobile v. Waring*, 41 Ala. 139

necessary to point out, however, that the sale need not be by the importer personally, but may be effectuated by means of an agent.⁷² Nor does it make any difference whether the sale is at wholesale, or by way of retail directly to consumers.⁷³

§ 20. What constitutes original package.

What seems to us the absurdity of the original package doctrine, has found abundant illustration in the deplorable confusion that has resulted in the attempt to apply it to particular cases, the most conspicuous being those of transportation of intoxicating liquors. "The term original package is not defined by any statute."⁷⁴ It is said, however, to be "a bundle put up for transportation or commercial handling, and usually consists of a number of things bound together, convenient for handling and conveyance." "The words 'original package' have reference to the unit which the carrier receives, transports, and delivers as an article of commerce. The importer decides for himself the size of the package which he desires to import, and when he delivers it to the carrier for

(1867), a case, however, of importation from a foreign country, a purchaser from the importer was held not exempt from a tax on sales, even in the original package. See also *Schollenberger v. Pennsylvania*, 171 U. S. 1, 24, 18 Supm. 757, 766, 43 L. ed. 49 (1898), reversing *Commonwealth v. Paul*, 170 Pa. St. 284, 33 Atl. 82, 30 L. R. A. 396, 50 Am. St. Rep. 776 (1895).

In support of doctrine stated in text, see also *McGuinness v. Bligh*, 11 R. I. 94 (1874); *State v. Robinson*, 49 Me. 285 (1862); *King v. McEvoy*, 4 Allen (Mass.), 110 (1862).

⁷² *Schollenberger v. Pennsylvania*, *supra*.

⁷³ Thus, in *Schollenberger v. Pennsylvania*, *supra*, the doctrine was applied against the objection that the packages in question were intended for the supply of the retail trade. (171 U. S. 24, 18 Supm. 766.)

⁷⁴ *Cook v. Marshall County*, 196 U. S. 261, 270, 25 Supm. 233, 235, 49 L. ed. 471 (1905).

transportation he gives it the initial step. * * * The original package, then, is that package which is delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped.”⁷⁵ Comparatively speaking, there is here stated a simple test, but a vast amount of confusion has been introduced by interpolating the additional questions of good faith and “usual method.” That is to say, in order that the transportation of an otherwise “original package” come within the scope of the doctrine it must appear that “the transaction is a *bona fide* one, and the usual methods of interstate shipment have not been departed from for the purpose of evading the police laws of the State.”⁷⁶

Or, as otherwise expressed, it must appear that “*the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country.*”⁷⁷ While in this view the

⁷⁵ *McGregor v. Cone*, 104 Iowa, 465, 471, 73 N. W. 1041, 1043, 39 L. R. A. 484, 65 Am. St. Rep. 522 (1898). See also *Guckenhheimer v. Sellers*, 81 Fed. 997 (C. C. S. C., 1897); *Keith v. State*, 91 Ala. 2, 8 So. 353, 10 L. R. A. 430 (Nov. T. 1890); *State ex rel. Gelpi v. Board of Assessors*, 46 La. Ann. 145, 15 So. 10, 49 Am. St. Rep. 318 (1894). In *Henderson v. Ortte*, 114 La. 523, 38 So. 440 (1905), a package containing a sewing machine was held to be an original package.

⁷⁶ *Cook v. Marshall County*, *supra*. Obviously, merely labeling an article as an “original package,” does not necessarily determine its character as such. *Keith v. State*, *supra*. Here, where a box and not the bottles contained therein was held to be the original package (see § 21), the mode of shipment adopted was said to be “manifestly a mere contrivance to evade the consequences of a violation of the State prohibition law.” *Keith v. State* was followed under like conditions in *Harrison v. State*, 91 Ala. 62, 10 So. 30 (Nov. T. 1890). As to good faith in transportation of liquors, see *Commonwealth v. Bishman*, 138 Pa. St. 639, 21 Atl. 12 (1891).

⁷⁷ *Austin v. Tennessee*, 179 U. S. 343, 359, 21 Supm. 132, 138, 45 L. ed. 224 (1900). See *Loverin & Brown Co. v. Tansil*, 102 S. W. 77 (Supm. Ct. Tenn., 1907).

size of a given package is not necessarily controlling, and while it is obviously impracticable to lay down a rule by which it shall be determined in advance what shall be the size (or shape) of such a package,⁷⁸ yet it must be of a size "in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States;"⁷⁹ or, as otherwise expressed, the package must be such as "could be commercially transported from one State to another as a separate importation."⁸⁰

The doctrine being, in our view, at least, so prodigious a mistake, it is probably not to be regretted that its scope is thus so radically limited, but it seems unfortunate that such limitation should be by so confused and uncertain a test, perhaps, however, the best practicable, that is also consistent with the retention of the doctrine at all.

§ 20a. *Austin v. Tennessee*.⁸¹

There was sustained a conviction under a Tennessee statute, making it a misdemeanor "to sell, offer to sell,

⁷⁸ *Cook v. Marshall County*, *infra*. In *Schollenberger v. Pennsylvania*, 171 U. S. 1, 24, 18 Supm. 757, 766, 43 L. ed. 49 (1898), reversing *Commonwealth v. Paul*, 170 Pa. St. 284, 33 Atl. 82, 30 L. R. A. 396, 50 Am. St. Rep. 776 (1895), there was held to be an original package, a ten-pound package of oleomargarine, manufactured, packed, marked, imported, and sold, under the circumstances set forth in detail in the special verdict. Here was distinguished *Commonwealth v. Schollenberger*, 156 Pa. St. 201, 27 Atl. 30, 22 L. R. A. 155, 36 Am. St. Rep. 32 (1893), where, in holding a package of oleomargarine not within the doctrine, it was said that a jury would have been justified in finding that the mode of putting it up "was not adapted to meet the requirements of actual interstate commerce, but the requirements of an unlawful, intrastate retail trade." See also as to size of package, *Keith v. State*, 91 Ala. 2, 8 So. 353, 10 L. R. A. 430 (Nov. T. 1890).

⁷⁹ *Austin v. Tennessee*, *supra*.

⁸⁰ *Cook v. Marshall County*, *supra*.

⁸¹ 179 U. S. 343, 21 Supm. 132, 45 L. ed. 224 (1900), affirming 101

or to bring into the State for the purpose of selling, giving away, or otherwise disposing of, any cigarettes, cigarette paper, or substitute for the same.” This was applied to the case of a sale of a paper package of three inches in length and one and one-half inches in width, containing ten cigarettes, imported from another State, and sold without breaking the package. They were imported by express, in open baskets, each containing a considerable number of such packages. Such packages were held not to be “original packages.” The court said:⁸² “No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and in a *bona fide* package of a particular size. Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another State, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee.”⁸³ And under

Tenn. 563, 48 S. W. 305, 50 L. R. A. 478, 70 Am. St. Rep. 703 (1898). See also *Blaufield v. State*, 103 Tenn. 593, 53 S. W. 1090 (1899); article in 6 Columbia Law Rev. 161 (1906), by William Trickett.

⁸² 179 U. S. 359, 21 Supm. 138.

⁸³ With reference to *Brown v. Maryland*, it was said (179 U. S. 351, 21 Supm. 135): “Whether the decision would have been the same if the original packages in that case, instead of being bales of dry goods or hogsheads, barrels or tierces of liquors, had been so minute in size as to permit of their sale directly to consumers, may admit of considerable doubt. Obviously the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import

such conditions it was held pertinent to inquire⁸⁴ whether "the intent of the party concerned was not to select the usual and ordinary method of transportation, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the State. If the natural result of such method be to render inoperative laws intended for the protection of the people, it is pertinent to inquire whether the act was not done for that purpose, and to hold that the interstate commerce clause of the Constitution is invoked as a cover for fraudulent dealing, and is no defense to a prosecution under the State law."

§ 21. Boxes and receptacles containing bottles.

In case of transportation of a box or like receptacle (such as a barrel or crate) containing bottles,⁸⁵ the

goods from foreign countries." See also comments on *Brown v. Maryland*, in *Cook v. Marshall County*, *infra*.

Austin v. Tennessee was followed under like conditions in *Cook v. Marshall County*, 196 U. S. 261, 25 Supm. 233, 49 L. ed. 471 (1905), affirming 119 Iowa, 384, 93 N. W. 372, 104 Am. St. Rep. 283 (1903), in sustaining a tax on account of the sale of cigarettes. Both were cases of imported cigarettes, the only difference being said to be that in the case at bar "no basket was used to hold the many small packages shipped at one and the same time to the same person."

The following decisions involving the sale of cigarettes must be regarded as overruled, in so far as inconsistent with the above decisions: *Re Minor*, 69 Fed. 233 (C. C. W. Va., 1895); *Sawrie v. State of Tennessee*, 82 Fed. 615 (C. C. Tenn., 1897); *State v. McGregor*, 76 Fed. 956 (C. C. Iowa, 1896); *Re May*, 82 Fed. 422 (C. C. Mont., 1897); *State v. Goetz*, 43 W. Va. 495, 27 S. E. 225, 64 Am. St. Rep. 871 (1897). See *Metz v. Hagerty*, 51 Ohio St. 521, 38 N. E. 11 (1894).

⁸⁴ *Cook v. Marshall County*, *supra*.

⁸⁵ Single bottles of intoxicating liquor were held original packages, in *Re Beine*, 42 Fed. 545 (C. C. Kan., 1890), and see *State v. Winters*, 44 Kan. 723, 25 Pac. 235, 10 L. R. A. 616 (1890). But this conclusion may be open to doubt, in view of the doctrine declared in *Austin v. Tennessee*.

question may arise whether it is the receptacle or the bottle that is the original package. It has commonly arisen as to intoxicating liquors,⁸⁶ but may also arise as to other classes of property, thus, medicines.⁸⁷ Generally speaking, the disposition seems to be to hold the receptacle rather than the bottle to be the original

⁸⁶ In *Guckenheimer v. Sellers*, 81 Fed. 997 (C. C. S. C., 1897), after a review of numerous decisions, it was concluded: "If in single bottles, shipped singly, or if in packages of three or more securely fastened together and marked, or if in a box, barrel, crate, or other receptacle, the single bottle, in the one instance, the three or more bottles, in another instance, the barrel, box, crate, or other receptacle, respectively constitute the original package." In *State v. Coonan*, 82 Iowa, 400, 48 N. W. 921 (1891), in case of bottles of liquor placed for convenience of shipment in open frame boxes with separate compartments, the bottles and not the box, were held to be the original packages. Followed under like conditions, in *State v. Miller*, 86 Iowa, 638, 53 N. W. 330 (1892). And so in *State v. Coonan*, of bottles packed in barrels. But in other cases of transportation of intoxicating liquors, it was the box that was held to be the original package. Thus, in *Smith v. State*, 54 Ark. 248, 15 S. W. 882 (1891). So in *Haley v. State*, 42 Neb. 556, 60 N. W. 962, 47 Am. St. Rep. 718 (1894), where it does not appear that the box was uncovered. So in *State v. Chapman*, 1 S. D. 414, 428, 47 N. W. 411, 415, 10 L. R. A. 432, 437 (1890), in case of an open box containing a number of bottles each wrapped in paper, or incased in a pasteboard box. To like effect, *Re Harmon*, 43 Fed. 372 (C. C. Miss., 1890), where it appeared that the box was furnished by the carrier and to be returned. Here were distinguished cases of exportation of whisky by the manufacturer in packages put up and stamped as required by the revenue laws. So in *Keith v. State*, 91 Ala. 2, 8 So. 353, 10 L. R. A. 430 (Nov. T. 1890), where the bottles were separately wrapped in tissue paper, each labeled "original package," with the name of the importer, and shipped in an open box with hay laid between them, each box marked with the number of bottles and their sizes contained therein.

⁸⁷ Thus in *State v. Parsons*, 124 Mo. 436, 27 S. W. 1102, 46 Am. St. Rep. 457 (1894), in case of medicine, the box and not the bottle, was held the original package. And so in *McGregor v. Cone*, 104 Iowa, 465, 73 N. W. 1041, 39 L. R. A. 484, 65 Am. St. Rep. 522 (1898), of a box containing packages of cigarettes. See § 20a.

package. But it also seems that the determination of the question in any given case is subject to the considerations already discussed, involving the questions of good faith and usual method. In some cases is manifest a disposition to draw a distinction between a covered and an uncovered receptacle, though it is said that "a distinction between a box securely covered and one uncovered, in respect to its character and status as an original package, is a distinction without a difference, unsupported by principle or reason."⁸⁸ It seems reasonably clear that if the bottles are shipped separately, their character as original packages is not taken away by the circumstance of the carrier, without the knowledge or agency of the shipper, transporting them in a box or other receptacle.⁸⁹

§ 22. Commerce as "among" the States.

Here reserving for consideration commerce "with foreign nations" and "with the Indian tribes," the subject of regulation is not all commerce, that is, transportation, but merely transportation *among the several States*. The word "among" said to mean "intermingled with"⁹⁰ certainly involves something more than operation merely at "the external boundary line of each State."⁹¹ It involves operation "within the territorial jurisdiction of the several States."⁹² That is to say, the subject of regulation in-

⁸⁸ *Keith v. State*, *infra*.

⁸⁹ *Keith v. State*, *infra*; *Tinker v. State*, 96 Ala. 115, 11 So. 383 (Nov. T. 1891-92).

⁹⁰ *Gibbons v. Ogden*, 9 Wheat. 1, 194, 6 L. ed. 23 (1824).

⁹¹ *Gibbons v. Ogden* (p. 194).

⁹² *Gibbons v. Ogden* (p. 196). See also *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678 (1827); *U. S. v. Coombs*, 12 Pet. 72, 9 L. ed. 1004 (Jan. T. 1838); *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743 (Oct. 1879); *Leisy v. Hardin*, 135 U. S. 100, 108, 10 Supm. 681, 683, 34 L. ed. 128 (1890). Thus it involves control of the navigable waters within a State. See § 14.

cludes transportation from a point within a given State to a point within another, the length of the distance of either of the terminal points from the boundary line of the State being obviously immaterial.⁹³ It makes no difference that such terminal points are not in adjoining States, that is to say, the route of transportation passing over other territory than that of the respective States. Of course, so far as concerns the power of a particular State to regulate, it makes no difference whether or not either of the terminal points is within its territorial limits. Thus whether one such point is within the State, or both outside, though the route of transportation may be through the State.⁹⁴ *A fortiori* if no portion of such route is within the State.⁹⁵

§ 23. Transportation wholly within limits of State.

The subject of regulation clearly excludes "the exclusively internal commerce of a State,"⁹⁶ which in-

⁹³ Thus there was held included traffic across a bridge spanning the Ohio River. *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 217, 14 Supm. 1087, 1092, 38 L. ed. 962 (1894), citing *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Supm. 826, 29 L. ed. 158 (1885).

⁹⁴ See *Fargo v. Michigan*, 121 U. S. 230, 238, 7 Supm. 857, 859, 30 L. ed. 888 (1887).

⁹⁵ See *McCall v. California*, 136 U. S. 104, 10 Supm. 881, 34 L. ed. 391 (1890), where a tax was held invalidly imposed upon interference with interstate transportation outside of the State.

⁹⁶ *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L. ed. 23 (1824). As to application of Federal anti-trust act, see *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 247, 20 Supm. 96, 109, 44 L. ed. 136 (1899); *People v. Butler Street Foundry, etc., Co.*, 201 Ill. 236, 250, 66 N. E. 349, 353 (1903); *State v. Jack*, 69 Kan. 387, 400, 76 Pac. 911, 915, 1 L. R. A. N. S. 167, 174 (1904). By section 1 of the Interstate Commerce Act (24 Stat. L. 379), transportation "wholly within one State" is expressly excluded from the application thereof. For instances of provisions for regulation by Congress being invalidated by inclusion of provision for regulation of

cludes transportation between points both within when over a route also wholly within the State. "The internal commerce of a State—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government."⁹⁷ This rule has been frequently applied in sustaining regulation of transportation under State authority,⁹⁸ con-

commerce within State, see *Brooks v. Southern Pac. Co.*, 148 Fed. 986 (C. C. Ky., 1906); *Howard v. Illinois Central R. R. Co.* (Supm. Ct. U. S. 1908), affirming 148 Fed. 997 (C. C. Tenn., 1907); *U. S. v. Scott*, 148 Fed. 431 (D. C. Ky., 1906).

As to transportation between points in State, one being in territory over which the United States has exclusive legislative jurisdiction, see *Western Union Tel. Co. v. Chiles*, 57 S. E. 587 (Supm. Ct. App. Va., 1907).

⁹⁷ *Sands v. Manistee River Improvement Co.*, 123 U. S. 288, 8 Supm. 113, 31 L. ed. 149 (1887). To similar effect, *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U. S. 557, 7 Supm. 4, 30 L. ed. 244 (1886). See *Geer v. Connecticut*, 161 U. S. 519, 531, 16 Supm. 600, 605, 40 L. ed. 793 (1896); *Howard v. Illinois Central R. R. Co.*, *supra*. See generally *Dugan v. State*, 125 Ind. 130, 25 N. E. 171, 9 L. R. A. 321 (1890).

In *Scammon v. Kansas City, St. Joseph, etc., R. Co.*, 41 Mo. App. 194 (1890), the transportation of live stock was held not within the scope of the commerce clause, because of stockyards (at Kansas City), where it was unloaded at point of destination, extending into another State, the actual point of unloading being in the State. In *State v. San Antonio & Aransas Pass Ry. Co.*, 32 Tex. Civ. App. 58, 73 S. W. 572 (1903), the stoppage of cotton en route for classification was held not to change the character of the transportation from interstate to domestic. See also *State v. International & Great Northern R. R. Co.*, 31 Tex. Civ. App. 219, 71 N. W. 944 (1903). As to effect of transfer of title to property shipped, see *Gulf, Colorado & Santa Fe Ry. Co. v. Texas*, 204 U. S. 403, 27 Supm. 360, 51 L. ed. 540 (1907); *Gulf, C. & S. F. Ry. Co. v. Fort Grain Co.*, 72 S. W. 419 (1903), 73 S. W. 844 (Tex. Civ. App. 1903).

⁹⁸ Thus of requirement of separate accommodations for white and colored passengers. *Louisville, New Orleans & Texas Ry. Co. v. Mississippi*, 133 U. S. 587, 10 Supm. 348, 33 L. ed. 784

spicuously fixing of rates therefor.⁹⁹ It makes no difference that such transportation is over a continuous line of communication, thus by railroad between

(1890), affirming 66 Miss. 662, 6 So. 203, 5 L. R. A. 132, 14 Am. St. Rep. 599 (1889); *Plessy v. Ferguson*, 163 U. S. 537, 16 Supm. 1138, 41 L. ed. 256 (1896); *Chesapeake & Ohio Ry. Co. v. Kentucky*, 179 U. S. 388, 21 Supm. 101, 45 L. ed. 244 (1900), affirming 51 S. W. 160 (Ct. App. Ky., 1899); *Ohio Valley Ry. v. Lander*, 104 Ky. 431, 47 S. W. 344, 882 (1898); *Southern Kansas Ry. Co. v. State*, 99 S. W. 166 (Tex. Civ. App. 1906). So of requirement of operation of separate passenger service. *State ex rel. v. Missouri Pac. Ry. Co.*, 92 Pac. 606, 618 (Supm. Ct. Kan., 1907). So as to prevention of discrimination. *Denver & N. O. R. R. Co. v. Atchison, T. & S. F. R. R. Co.*, 15 Fed. 650, 658 (C. C. Colo., 1883); reversed in *Atchison, Topeka & Santa Fe R. R. Co. v. Denver & New Orleans R. R. Co.*, 110 U. S. 667, 4 Supm. 185, 28 L. ed. 291 (1884); *Louisville & Nashville R. R. Co. v. Kentucky*, 183 U. S. 503, 518, 22 Supm. 95, 101, 46 L. ed. 298 (1902), affirming 106 Ky. 633, 51 S. W. 164, 1012, 90 Am. St. Rep. 236 (1899); *Adams Express Co. v. State*, 161 Ind. 328, 347, 67 N. E. 1033, 1040 (1903); *American Express Co. v. Southern Indiana Express Co.*, 167 Ind. 292, 78 N. E. 1021, 1028 (1906); *Chicago, St. Louis & Pittsburg R. R. Co. v. Wolcott*, 141 Ind. 267, 279, 39 N. E. 451, 454, 50 Am. St. Rep. 320 (1895).

⁹⁹ Thus for transportation by railroad. *Chicago, Burlington & Quincy R. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94 (Oct. 1876); *Peik v. Chicago & Northwestern Ry. Co.*, 94 U. S. 164, 24 L. ed. 97 (Oct. 1876); *Dow v. Beidelman*, 125 U. S. 680, 8 Supm. 1028, 31 L. ed. 841 (1888); *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174, 9 Supm. 47, 32 L. ed. 377 (1888); *Chicago, M. & St. P. Ry. Co. v. Becker*, 32 Fed. 849 (C. C. Minn., 1887); *State v. Chicago, M. & St. P. Ry. Co.*, 33 Fed. 391 (C. C. Iowa, 1887); *Commissioner of Railroads v. Wabash R. R. Co.*, 123 Mich. 669, 82 N. W. 526 (1900); *Purdy v. Erie R. R. Co.*, 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669 (1900); dismissed for want of jurisdiction in *Erie R. R. Co. v. Purdy*, 185 U. S. 148, 22 Supm. 605, 46 L. ed. 847 (1902); *Beardsley v. N. Y., Lake Erie & Western R. R. Co.*, 15 App. Div. 251, 44 N. Y. Suppl. 175 (1897). See *Stone v. Yazoo & Mississippi Valley R. R. Co.*, 62 Miss. 607, 52 Am. Rep. 193 (1885). So as to transportation by turnpike. *Covington & Lexington Turnpike Co. v. Sandford*, 164 U. S. 578, 17 Supm. 198,

points in different States,¹ for instance transportation between Philadelphia and Pittsburg over a line extending from Philadelphia to Chicago.

§ 24. Transaction within limits of State, when included.

Although, generally speaking, as we have seen, the subject of regulation excludes transactions carried on wholly within a State, yet it may include such a transaction regarded as an incident of transportation within the scope of the commerce clause.² In view of

41 L. ed. 560 (1896). Transmission of messages by telephone. *Central Union Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114 (1888).

As however to necessity that the reasonableness or unreasonableness of rates prescribed under State authority be determined without reference to receipts for transportation within scope of commerce clause, see *Smyth v. Ames*, 169 U. S. 466, 541, 18 Supm. 418, 432, 42 L. ed. 819 (1898), affirming *Ames v. Union Pacific Ry. Co.*, 64 Fed. 165 (C. C. Neb., 1894); *Alabama & Vicksburg Ry. Co. v. Mississippi R. R. Comm.*, 203 U. S. 496, 27 Supm. 163, 51 L. ed. 289 (1906); *Chicago, M. & St. P. Ry. Co. v. Tompkins*, 90 Fed. 363 (C. C. S. D., 1898); *Northern Pac. Ry. Co. v. Keyes*, 91 Fed. 47 (C. C. N. D., 1898); *State v. U. S. Express Co.*, 81 Minn. 87, 83 N. W. 465, 50 L. R. A. 667, 83 Am. St. Rep. 366 (1900); *State v. Seaboard Air Line Ry.*, 48 Fla. 129, 37 So. 314 (1904).

¹ *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 334, 6 Supm. 334, 346, 29 L. ed. 636 (1886), reversing *Illinois Cent. R. R. Co. v. Stone*, 20 Fed. 468 (C. C. Miss., 1884). And see prior decision in *Farmers' Loan & Trust Co. v. Stone*, Id. 270. Other illustrations of the rule are numerous. See decisions *supra*.

² In *Norfolk & Western R. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Supm. 958, 34 L. ed. 394 (1890), reversing 114 Pa. St. 256, 6 Atl. 45 (1886), was held invalidly imposed a license tax upon a foreign railroad corporation on account of having an office for the use of its officers, stockholders, agents, and employees in the State. Though such corporation, with trifling exceptions, owned no property and had no capital invested for corporate purposes within the State, it had, by virtue of its connections and traffic contracts, become a link in a through line, over which freight and passen-

the increasing complexity of commercial transactions, it is frequently a matter of difficulty and delicacy to de-

ters were carried into and out of the State. It did not "exercise or seek to exercise in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purposes thereof." The office "was maintained because of the necessities of the interstate business of the company and for no other purpose." And the following are other instances of transactions that, considered by themselves, were wholly within the State but were held included within the subject of regulation as incidents of transportation within the scope of the commerce clause.

Thus in determining the validity of taxation under State authority have been held included: Leasing of property, where were kept samples, also keeping of bank account. *People ex rel. H. B. Smith Co. v. Roberts*, 27 App. Div. 455, 50 N. Y. Suppl. 355 (1898). Landing and receiving at a wharf as an incident of transportation by ferry. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Supm. 826, 29 L. ed. 158 (1885). To like effect, *People ex rel. Pennsylvania R. R. Co. v. Wemple*, 138 N. Y. 1, 33 N. E. 720, 19 L. R. A. 694 (1893); *Clyde S.S. Co. v. City Council of Charleston*, 76 Fed. 46 (C. C. S. C., 1896). So in case of interstate sales, of providing place for taking orders, and supplying temporary storage for articles in course of transportation. *People ex rel. Lembeck, etc., Brewing Co. v. Roberts*, 22 App. Div. 282, 47 N. Y. Suppl. 949 (1897).

In *Fielder v. Missouri, K. & T. Ry. Co.*, 42 S. W. 362 (Tex. Civ. App. 1897); affirmed in 92 Tex. 176, 46 S. W. 633 (1898), for the purpose of determining the liability of a carrier for discrimination, it was held part of the interstate transportation of coal to place it on spur tracks leading to the bins of the consignee. And in *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 26 Supm. 722, 50 L. ed. 1142 (1906), affirming *Southern Ry. Co. v. Greensboro Ice & Coal Co.*, 134 Fed. 82 (C. C. N. C., 1904), it was held beyond State authority to require cars loaded with coal transported from other States to be switched to a consignee's sidetrack, irrespective of the rules and regulations of the carrier. In *Louisville & N. R. R. Co. v. Central Stockyards Co.*, 97 S. W. 778, 790 (Ct. App. Ky., 1906), however, the imposition of duty to switch to line of another carrier was sustained under like conditions. In *State v. Chicago, M. & St. P. Ry. Co.*, 33 Fed. 391 (C. C. Iowa, 1897), was sustained imposition under State authority of duties as to the use of side and spur tracks, also

termine, in a given case, whether a transaction is thus included. The burden of proof seems to be upon one

regulation of charges for performance of such duties. In *People ex rel. Connecting Terminal R. R. Co. v. Miller*, 178 N. Y. 194, 70 N. E. 472 (1904), an exception from taxation of "earnings derived from business which is of an interstate character" was held to apply to a business conducted within the State and consisting wholly in loading and unloading and storing freights in course of transportation between points in different States.

Swift v. U. S., 196 U. S. 375, 25 Supm. 276, 49 L. ed. 518 (1905), affirming *U. S. v. Swift*, 122 Fed. 529 (C. C. Ill., 1903), goes to what seems a questionable length. Here, for the purpose of applying the Federal anti-trust act, the subject of regulation was held to include (with reference to the business of those extensively engaged in purchasing live stock, which they converted into meat and sold) the purchase of live stock shipped habitually from other States to the markets where they purchased, in the expectation that the purchase would be made by them. See also as to charges for cartage for delivery of meats sold. See also § 25.

As to contract to manufacture article agreed to be transported out of State, see *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 246, 20 Supm. 96, 109, 44 L. ed. 136 (1899).

On the other hand, the following are instances of transactions that, considered by themselves, were wholly within the State and were held not included within the subject of regulation: Running of cabs and carriages by a foreign railroad corporation for hire, though it was also engaged in interstate transportation. *State ex rel. Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21, 24 Supm. 202, 48 L. ed. 325 (1904), affirming *People ex rel. Pennsylvania R. R. Co. v. Knight*, 171 N. Y. 354, 64 N. E. 152, 98 Am. St. Rep. 610 (1902). Conducting warehouse, though used by those engaged in interstate commerce. *Munn v. Illinois*, 94 U. S. 113, 135, 24 L. ed. 77 (Oct. 1876). See however *People ex rel. Connecting Terminal R. R. Co. v. Miller*, *infra*. Switching cars used in interstate transportation. *Chicago, M. & St. P. Ry. Co. v. Becker*, 32 Fed. 849 (C. C. Minn., 1887). And see *State v. Chicago, M. & St. P. Ry. Co.*, 33 Fed. 391 (C. C. Iowa, 1887), *supra*. In *Larabee Flour Mills Co. v. Missouri Pac. Ry. Co.*, 74 Kan. 808, 88 Pac. 72 (1906), for the purpose of determining liability for discrimination, there was held not included switching of cars to line of another carrier, though containing freight afterward transported by such carrier out of the State.

asserting that it is.³ The question has commonly arisen in determining the validity of a restriction imposed under State authority. Although, as will presently be seen, it is at least doubtful whether in case of continuous transportation between points in different States a portion performed by a carrier acting wholly within a single State is within the subject of regulation, in the absence of any arrangement for continuous transportation, it seems established that services in the nature of lightering or towing, rendered wholly within a State, to vessels at the beginning or termination of an interstate or foreign voyage, are within the subject of regulation.⁴ Though such services, strictly speaking,

In *Cotting v. Kansas City Stock-Yards Co.*, 82 Fed. 850 (C. C. Kan., 1897), it was thought unnecessary to decide whether, with reference to cattle transported from other States, the business of yarding, feeding, watering, and weighing them was interstate commerce. In so far as it was assumed that it was, there seems to have been erroneously sustained the fixing of charges for such service under State authority. It was held however that the character of the business as intrastate was not affected by the circumstance of the yards being located partly in another State, the cattle being herded on both sides of the line and driven to and fro across the line for the sake of convenience. See previous decision in 82 Fed. 839 (1897).

For instances of transactions held not within scope of Federal anti-trust act, see *Hopkins v. U. S.*, 171 U. S. 578, 19 Supm. 40, 43 L. ed. 290 (1898), reversing *U. S. v. Hopkins*, 82 Fed. 529 (C. C. Kan., 1897); *Anderson v. U. S.*, 171 U. S. 604, 19 Supm. 50, 43 L. ed. 300 (1898); *Cincinnati, etc., Packet Co. v. Bay*, 200 U. S. 179, 26 Supm. 208, 50 L. ed. 428 (1906); *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689 (8th C. 1903); *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593, 61 C. C. A. 19 (8th C. 1903).

As to imposition of restrictions upon exercise of power of eminent domain, see § 66.

³ See *State ex rel. Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21, 24 Supm. 202, 48 L. ed. 325 (1904).

⁴ Thus of a vessel engaged in lightering. *Foster v. Davenport*, 22 How. 244, 16 L. ed. 248 (Dec. T. 1859), where it was said that "the lightering or towing was but the prolongation of the voyage

involve transportation, they are doubtless, by reason of their local character, distinguishable from the ordinary case of transportation between different points in the same State.

§ 25. Other transactions than transportation; e. g., sale and manufacture, wholly within limits of State.

If the subject of regulation excludes transportation between points within a given State, *a fortiori* does it exclude other transactions carried on wholly within the State, such as sale and manufacture.⁵ Nor does

of the vessels assisted to their port of destination." So in *Harman v. Chicago*, 147 U. S. 396, 13 Supm. 306, 37 L. ed. 216 (1893), reversing 140 Ill. 374, 29 N. E. 732 (1892); *Re Vessel Owners' Towing Co.*, 26 Fed. 169 (D. C. Ill., 1886), of tugs similarly situated. See also as to tugs, *Harmon v. City of Chicago*, 110 Ill. 400, 51 Am. Rep. 698 (1884); *City of St. Louis v. Consolidated Coal Co.* 158 Mo. 342, 59 S. W. 103, 51 L. R. A. 850, 81 Am. St. Rep. 310 (1900); *The Farragut*, 6 Blatchf. 207, 8 Fed. Cas. No. 4,677 (1868).

⁵ Thus, of oleomargarine, *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Supm. 120, 46 L. ed. 171 (1902); of intoxicating liquors, *Kidd v. Pearson*, 128 U. S. 1, 9 Supm. 6, 32 L. ed. 346 (1888), affirming *Pearson v. International Distillery*, 72 Iowa, 348, 34 N. W. 1 (1887); of cider vinegar, *People v. Niagara Fruit Co.*, 75 App. Div. 11, 77 N. Y. Suppl. 805 (1902); affirmed in 173 N. Y. 629, 66 N. E. 1114 (1903). So as to operation of grain elevator or warehouse, *Budd v. New York*, 143 U. S. 517, 545, 12 Supm. 468, 476, 36 L. ed. 247 (1892), affirming *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 5 L. R. A. 559, 15 Am. St. Rep. 460 (1889); *People v. Walsh*, 117 N. Y. 621, 22 N. E. 682 (1889); *Brass v. North Dakota ex rel. Stoesser*, 153 U. S. 391, 14 Supm. 857, 38 L. ed. 757 (1894), affirming *State v. Brass*, 2 N. D. 482, 52 N. W. 408 (1892); *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 470, 21 Supm. 423, 429, 45 L. ed. 619 (1901), affirming *State v. W. W. Cargill Co.*, 77 Minn. 223, 79 N. W. 962 (1899). See *State v. Omaha Elevator Co.*, 110 N. W. 874 (Supm. Ct. Neb., 1906). See as to mining coal, *State v. Kansas & T. Coal Co.*, 96 Fed. 353, 359 (C. C. Ark., 1899).

So in *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Supm. 249, 39 L. ed. 325 (1895), affirming 60 Fed. 934, 9 C. C. A. 297, 24

it make any difference that such sale or manufacture is of an article intended for transportation to a point

L. R. A. 428 (3d C. 1894), which affirmed 60 Fed. 306 (C. C. Pa., 1894), for the purpose of applying the Federal anti-trust act, there was held not included the mere acquiring of certain manufacturing plants. To like effect, as excluding mere manufacture or sale, *Merz Capsule Co. v. U. S. Capsule Co.*, 67 Fed. 414 (C. C. Mich., 1895); *Robinson v. Suburban Brick Co.*, 127 Fed. 804, 62 C. C. A. 484 (4th C. 1904); *Davis v. Booth*, 131 Fed. 31, 65 C. C. A. 269 (6th C. 1904), affirming *Booth v. Davis*, 127 Fed. 875 (C. C. Mich., 1904); *Gibbs v. McNeeley*, 102 Fed. 594 (C. C. Wash., 1900); 107 Fed. 210 (C. C. Wash., 1901); reversed in 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152 (9th C. 1902). See also *Re Greene*, 52 Fed. 104, 112 (C. C. Ohio, 1892); *Dueber Watch-Case Manuf. Co. v. Howard Watch & Clock Co.*, 66 Fed. 637, 14 C. C. A. 14 (2d C. 1895); *Northern Securities Co. v. U. S.*, 193 U. S. 197, 331, 24 Supm. 436, 455, 48 L. ed. 679 (1904); *Slaughter v. Thacker Coal & Coke Co.*, 55 W. Va. 642, 47 S. E. 247, 65 L. R. A. 342, 104 Am. St. Rep. 1013 (1904).

But see *Gibbs v. McNeeley*, *supra* (118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152), holding the act applicable to a combination among manufacturers and dealers, as affecting commerce within the scope of the commerce clause. So in *Montague v. Lowry*, 193 U. S. 38, 24 Supm. 307, 48 L. ed. 608 (1904), affirming *W. W. Montague & Co. v. Lowry*, 115 Fed. 27, 52 C. C. A. 621, 63 L. R. A. 58 (9th C. 1902), which affirmed *Lowry v. Tile, Mantel & Grate Assoc.*, 106 Fed. 38 (C. C. Cal., 1900), previous decision in 98 Fed. 817 (C. C. Cal., 1899), of what was not a combination among manufacturers merely, but one between them and dealers in the manufactured article, which was a subject of transportation within the scope of the commerce clause.

See also *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155 (C. C. N. Y., 1905); also generally as to application of act to contracts affecting such commerce, § 32.

See comments on *U. S. v. E. C. Knight Co.* in *Swift v. U. S.*, 196 U. S. 375, 397, 25 Supm. 276, 279, 49 L. ed. 518 (1905). Clearly wrong, as contrary to the well-settled doctrine, seems *People v. Hawkins*, 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736 (1898), though it may be sustainable on other grounds without reference to the application of the commerce clause. Here was held invalid, as to an article made in another State, a statute merely placing restrictions on the sale of convict-made articles.

outside of the State.⁶ Although the rule has been more frequently applied in sustaining regulation under State authority,⁷ it is equally applicable in excluding

It does not appear that the article in question was brought into the State in pursuance of any pre-existing contract or that the sale was in the original package, and it distinctly appears that there was no discrimination against products of other States.

See generally as to sales or contracts of sale involving transportation wholly within the State, § 76.

⁶ *Kidd v. Pearson*, *supra*; *U. S. v. E. C. Knight Co.*, *supra*; *People v. Niagara Fruit Co.*, *supra*; *Tredway v. Riley*, 32 Neb. 495, 49 N. W. 268, 29 Am. St. Rep. 447 (1891); *Standard Underground Cable Co. v. Attorney-General*, 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394 (1889). Thus, as to an ordinance prohibiting catching fish, *Ex parte Fritz*, 86 Miss. 210, 30 So. 722, 109 Am. St. Rep. 700 (1905). As to application of Federal anti-trust act, see *U. S. v. E. C. Knight Co.*, *supra*; *Gibbs v. McNeeley*, 102 Fed. 594 (C. C. Wash., 1900); 107 Fed. 210 (C. C. Wash., 1901).

In *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 23 Supm. 206, 47 L. ed. 328 (1903), affirming 103 Fed. 838 (C. C. Wis., 1900), were sustained restrictions upon the transaction of business by a foreign corporation, against the objection that its business (as described in a contract with another corporation) involved interstate commerce. Such contract provided for manufacture by it within the State, and the sale by it, of the output. The court said: "The portion of the contract that called for the carrying on of business in Wisconsin was not so concerned, and the inseparable provisions as to selling left it to chance or extrinsic business considerations whether the contemplated traffic should go outside of the State."

⁷ Thus have been sustained such regulations as applicable to taking, planting, or cultivating oysters, even though in tide waters. *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248 (Oct. 1876), affirming 27 Gratt. (Va.) 985 (1876); *State v. Corson*, 67 N. J. Law, 178, 50 Atl. 780 (1901).

See *Johnson v. Loper*, 46 N. J. Law, 321 (1884); *Haney v. Compton*, 36 N. J. Law, 507 (1873); *State v. Medbury*, 3 R. I. 138 (1855); *Jones v. Oemler*, 110 Ga. 202, 35 S. E. 375 (1900). Compare *State v. Applegarth*, 81 Md. 293, 31 Atl. 961, 28 L. R. A. 812 (1895); *Applegarth v. State*, 89 Md. 140, 42 Atl. 941 (1899).

regulation under authority of Congress.⁸ The incidental effect of action under State authority upon transportation within the scope of the commerce clause, will be hereafter considered.

So of prohibition of use of certain instruments in dredging for oysters. *Smith v. State of Maryland*, 18 How. 71, 15 L. ed. 269 (Dec. T. 1855; so held as applicable to vessel enrolled and licensed under Congressional legislation). To similar effect, *Lee v. State of New Jersey*, 207 U. S. 67, 28 Supm. 22 (1907); *Cornfield v. Coryell*, 4 Wash. C. C. 371, 6 Fed. Cas. No. 3,230 (1823); *Boggs v. Commonwealth*, 76 Va. 989 (1882). See *Lawton v. Steele*, 152 U. S. 133, 14 Supm. 499, 38 L. ed. 385 (1894); *Chambers v. Church*, 14 R. I. 398, 51 Am. Rep. 410 (1884). So in *Dize v. Lloyd*, 36 Fed. 651 (C. C. Md., 1888), of prohibition of taking oysters by nonresidents, and exacting license for dredging therefor. See *Brooks v. Tripp*, 135 N. C. 159, 47 S. E. 401 (1904). So in *Dunham v. Lamphere*, 3 Gray (Mass.), 268 (1855), of prohibiting taking fish by seining. So in *Bennett v. Boggs*, Baldw. 60, 3 Fed. Cas. No. 1,319 (1830), of prohibiting the use of gulling seines. So as to fishing in waters belonging to the State, *Morgan v. Commonwealth*, 98 Va. 812, 35 S. E. 448 (1900); *Re Mattson*, 69 Fed. 535 (C. C. Oreg., 1895).

In *Manchester v. Massachusetts*, 139 U. S. 240, 11 Supm. 559, 35 L. ed. 159 (1891), affirming *Commonwealth v. Manchester*, 152 Mass. 230, 25 N. E. 113, 9 L. R. A. 236, 23 Am. St. Rep. 820 (1890), was sustained statute for protection of fisheries within bay within territorial limits of the State. Applied under like conditions in *State v. Thompson*, 85 Me. 189, 27 Atl. 97 (1892). See article in 3 Harv. Law Rev. 346 (1890), by C. F. Chamberlayne. See also *Louisiana v. Mississippi*, 202 U. S. 1, 52, 26 Supm. 408, 422, 50 L. ed. 913 (1906); *U. S. v. Alaska Packers' Asso.*, 79 Fed. 152 (C. C. Wash., 1897).

⁸ Thus, in *U. S. v. Dewitt*, 9 Wall. 41, 19 L. ed. 593 (Dec. 1869), of a prohibition of the sale within a State of illuminating oils, no tax being imposed on the oils, the sale of which was prohibited. That Congress cannot authorize a trade or business within a State in order to tax it, see *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497 (Dec. 1866).

As to legislation by Congress providing for inspection of cattle, see § 37.

§ 26. Transportation by different and independent agencies.

It seems clear enough that transportation, otherwise subject to regulation under the commerce clause, is not removed from its operation merely because of being carried on by different agencies, some acting entirely in one State. Thus a contract for continuous transportation, say from Philadelphia to a point in a distant western State, under a through bill of lading, is doubtless subject to such regulation, even as to transportation between Philadelphia and Pittsburg, and on the supposition that that part of the transportation is performed by a carrier whose agency in the transportation is confined to such part.⁹ The application of the commerce clause in this respect is well illustrated by the Interstate Commerce Act, applicable by its terms to carriage "*under a common control, management, or arrangement, for a continuous carriage or shipment.*"¹⁰ It should be borne in mind that such provision does not necessarily exhaust the power of Congress in this respect, and transportation by an independent agency wholly within a State may well be

⁹ See *State ex rel. Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21, 24 Supm. 202, 48 L. ed. 325 (1904), affirming *People ex rel. Pennsylvania R. R. Co. v. Knight*, 171 N. Y. 354, 64 N. E. 152, 98 Am. St. Rep. 610 (1902).

¹⁰ Act of 1887 (24 Stat. L. 379). For instances of its application, see *Cincinnati, New Orleans, etc., Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Supm. 700, 40 L. ed. 935 (1896); *Louisville & Nashville R. R. Co. v. Behlmer*, 175 U. S. 648, 662, 20 Supm. 209, 214, 44 L. ed. 309 (1900); *U. S. v. Seaboard Ry. Co.*, 82 Fed. 563 (C. C. Ala., 1897); *Interstate Stock-Yards Co. v. Indianapolis U. Ry. Co.*, 99 Fed. 472 (C. C. Ind., 1900); *Interstate Commerce Commission v. Louisville & N. R. Co.*, 118 Fed. 613, 625. (C. C. Ga., 1902).

See *Interstate Commerce Commission v. Bellaire, etc., Ry. Co.*, 77 Fed. 942 (C. C. Ohio, 1897); *U. S. ex rel. Kellogg v. Lehigh Val. R. Co.*, *infra*; *U. S. v. Standard Oil Co.*, 155 Fed. 305, 310 (D. C. Ill., 1907).

within the scope of the commerce clause, though not within such provision.¹¹ It seems, however, the better view that even continuous transportation between points in different States is not, as to such transportation by an independent agency wholly within a State, included in the subject of regulation, in the absence of any arrangement for continuous transportation.¹² If the existence of such arrangement as a necessary

¹¹ Thus, in *Ex parte Koehler*, 30 Fed. 867 (C. C. Oreg., 1887), transportation between points within the State was held, though within the scope of the commerce clause, yet not within that of such provision of the Interstate Commerce Act. The point seems, however, to have been overlooked in *U. S. ex rel. Kellogg v. Lehigh Val. R. Co.*, 115 Fed. 373 (D. C. N. Y., 1902). So in *Fort Worth & Denver City Ry. Co. v. Whitehead*, 6 Tex. Civ. App. 595, 26 S. W. 172 (1894), in determining the validity of regulation under State authority, of rates for transportation.

In *Texas & Pacific Ry. Co. v. Davis*, 93 Tex. 378, 55 S. W. 562 (1900), reversing 54 S. W. 381 (Tex. Civ. App. 1899), a contract for transportation of cattle by rail between points in the State, was held foreign commerce, they being shipped after transportation on foot from a point outside the State.

In *People ex rel. N. Y. Central, etc., R. R. Co. v. Miller*, 94 App. Div. 587, 88 N. Y. Suppl. 373 (1904), an exception from taxation of "earnings derived from business of an interstate character" was held to include earnings derived from transportation by railroad wholly within the State, for "express freights which were either shipped from points in the State for delivery out of the State or from points out of the State for delivery in the State."

¹² In *Gulf, Colorado & Santa Fe Ry. Co. v. Texas*, 204 U. S. 403, 27 Supm. 360, 51 L. ed. 540 (1907), affirming 97 Tex. 274, 78 S. W. 495 (1904), 32 Tex. Civ. App. 1, 73 S. W. 429 (1903), in case of termination of transportation into the State, and delivery to the consignee, the subject of regulation was held not to include subsequent transportation, after an interval of several days, between points in the State, upon a bill of lading showing on its face only a local transportation. See as to effect of transfer of title during transportation. See this decision distinguished in *U. S. v. N. Y. Cent. & H. R. R. Co.*, 153 Fed. 630 (D. C. N. Y., 1907).

condition be dispensed with, the alternative seems to be that the mere purpose or intent of the shipper at the time of shipment (or it may be, afterward) that transportation shall be to a point outside of the State, is sufficient to bring it within the scope of the commerce clause.¹³ There seems, however, to be serious practical, even if not legal, objection, to making the determination of the character of the transportation as subject or not subject to regulation under the commerce clause, rest on so vague and uncertain a test as the purpose or intent of the shipper,¹⁴ commonly a

But in *Corcoran v Louisville & N. R. Co.*, 101 S. W. 1185 (Ct. App. Ky., 1907), the subject of regulation was held to include transportation between points in the State, of property consigned, however, at a through rate from a point beyond the State, and transported between such points within the State at the rate filed with the Interstate Commerce Commission and the State railroad commission, it being held immaterial that there was no *express* contract of carriage between the initial carriers and the carrier transporting wholly within the State.

In *U. S. v. Geddes*, 131 Fed. 452, 65 C. C. A. 320 (6th C. 1904), the requirements of the acts of March 2, 1893 (27 Stat. L. 532), April 1, 1896 (29 Stat. L. 85), as to safety appliances to be used by a "carrier engaged in *interstate commerce* by railroad," were held inapplicable to a railroad operated wholly within a State, though connecting with another carrier from which it received freight from other States marked for points on its line, and to which it delivered freight from points on its line marked for other States, there being, however, "no through bill of lading, no through charge, no conventional division thereof among the carriers, and no arrangement for a continuous carriage or shipment." And "the method of transfer by which the receiving road assumed the payment of the charges of the delivering road" was held not to constitute such an arrangement. See however *U. S. v. Southern Ry. Co.*, 135 Fed. 122 (D. C. Ill., 1905).

¹³ So held in *Gulf, C. & S. F. Ry. Co. v. Fort Grain Co.*, 72 S. W. 419 (1903), 73 S. W. 844 (Tex. Civ. App. 1903), as to transportation by railroad, it being regarded as unnecessary that such transportation be under a through bill of lading.

¹⁴ In accord with this view seems *Gulf, Colorado & Santa Fe Ry. Co. v. Texas*, *supra*.

matter of much difficulty to satisfactorily prove. There seems no reason to think that, as to the application of such test, there is any essential distinction between transportation of persons and of property.¹⁵

§ 26a. The *Daniel Ball*.¹⁶

The view that has obtained some recognition, that transportation between points in different States is, as to a part performed wholly within a single State, subject to regulation under the commerce clause, even in the absence of any arrangement for continuous transportation, seems largely based on a decision holding an act of Congress regulating navigation upon "*navigable waters of the United States*" applicable to a vessel engaged in transporting *between points in the same State*,¹⁷ goods destined and marked for other States, and in receiving and transporting goods brought

¹⁵ See *Gulf, Colorado & Santa Fe Ry. Co. v. Texas*, *supra*; *People ex rel. Pennsylvania R. R. Co. v. Knight*, *supra*; *White v. St. Louis Southwestern Ry. Co.*, 86 S. W. 962 (Tex. Civ. App. 1905).

¹⁶ 10 Wall. 557, 19 L. ed. 999 (Dec. 1870). The decision was applied in *Houston Direct Navigation Co. v. Ins. Co. of North America*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17 (1895), reversing 31 S. W. 560 (Tex. Civ. App. 1895), though the initial carrier gave a bill of lading to a point in the same State only, charges for freight to one of such points only, with wharfage thereat being paid, and on this point *Houston Direct Navigation Co. v. Ins. Co. of North America* was followed in *Texas & Pac. Ry. Co. v. Avery*, 33 S. W. 704 (Tex. Civ. App. 1895); *Mexican Nat. R. Co. v. Savage*, 41 S. W. 663 (Tex. Civ. App. 1897); *State v. Gulf, Colorado & Santa Fe Ry. Co.*, *infra*; *Gulf, W. T. & P. Ry. Co. v. Barry*, 45 S. W. 814 (Tex. Civ. App. 1898). See *State v. Southern Kan. Ry. Co.*, 49 S. W. 252 (Tex. Civ. App. 1899); *Houston & Texas Central Ry. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308 (1895).

¹⁷ On however a navigable water of the United States. See § 14.

within the State from without its limits. So held though *her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States*. If now the principle of this decision be applicable to *transportation by land*,¹⁸ it may be difficult to avoid the conclusion that such transportation between points in different States is, as to a part performed wholly within a single State, within the subject of regulation, even in the absence of any arrangement for continuous transportation. But the decision seems referable rather to the grant of admiralty and maritime jurisdiction, than to the commerce clause,¹⁹ and hence not authority for the view suggested.

¹⁸ It was held so applicable, that is, to transportation by railroad, for the purpose of determining the jurisdiction of a State railroad commission, in *Cutting v. Florida Ry. & Nav. Co.*, 46 Fed. 641 (C. C. Fla., 1891); *State v. Gulf, C. & S. F. Ry. Co.*, 44 S. W. 542 (Tex. Civ. App. 1898). These two decisions were, in *St. Louis Southwestern Ry. Co. v. Arkansas & T. Grain Co.*, 95 S. W. 656 (Tex. Civ. App. 1906), applied to a case of what was intended to be continuous transportation between points in different States, such transportation being interrupted in the State of destination, for the sole purpose of obtaining the advantage of a rate fixed under the authority of the State. See also *State v. International & Great Northern R. R. Co.*, 31 Tex. Civ. App. 219, 71 S. W. 994 (1903); *Ex parte Koehler*, 25 Fed. 73 (C. C. Oreg. 1885), 30 Fed. 867 (C. C. Oreg., 1887); *Chicago, St. P., M. & O. Ry. Co. v. Becker*, 35 Fed. 883 (C. C. Minn., 1888).

¹⁹ This seems clearly demonstrated in *People ex rel. Pennsylvania R. R. Co. v. Knight*, 171 N. Y. 354, 362, 64 J. E. 152, 154, 98 Am. St. Rep. 610 (1902), affirmed in *State ex rel. Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21, 24 Supm. 202, 48 L. ed. 325 (1904). See *U. S. v. Geddes*, 131 Fed. 452, 65 C. C. A. 320 (6th C. 1904).

§ 27. Transportation between points both within, but over route partly outside of, State.

It seems reasonably established that the subject of regulation though, as just seen, generally excluding transportation between points both within a given State, yet includes transportation between such points if over a route partly outside the State, at any rate when the portion outside constitutes a substantial portion of the whole.²⁰

²⁰In *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617, 23 Supm. 214, 47 L. ed. 333 (1903), affirming *Kansas City S. Ry. Co. v. R. R. Commrs. of Arkansas*, 106 Fed. 353 (C. C. Ark., 1901), was denied power to fix under State authority the rate for transportation between such points, more than half the route however being outside the State. The court said: "No one contends that the regulation could be split up according to the jurisdiction of State or Territory over the track, or that both State and Territory may regulate the whole rate. There can be but one rate fixed by one authority, whether that authority be Arkansas or Congress. But it would be more logical to allow a division according to the jurisdiction over the track than to declare that the subject for regulation is indivisible, yet that the indivisibility does not depend upon the commerce being under the authority of Congress, but upon a fiction which attributes it wholly to Arkansas, although that fiction is quite beyond the power of Arkansas to enforce." Here was followed as applicable *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. ed. 224 (Oct. 1880), sustaining regulation by Congress as applied to navigation on the high seas between ports of the same State; so of *Pacific Coast Steam Ship Co. v. R. R. Commrs.*, 18 Fed. 10 (C. C. Cal., 1883), denying validity of regulation under State authority under such conditions. To the same effect, as to navigation on high seas, see *Cowden v. Pacific Coast S.S. Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142 (1892).

To the same effect with *Hanley v. Kansas City Southern Ry. Co.*, see *Sternberger v. Cape Fear & Yadkin Valley R. R. Co.*, 29 S. C. 510, 7 S. E. 836, 2 L. R. A. 105 (1888); *State v. Chicago, St. Paul, etc., Ry. Co.*, 40 Minn. 267, 41 N. W. 1047, 3 L. R. A. 238, 12 Am. St. Rep. 730 (1889). And so for purpose of giving effect to Interstate Commerce Act, in *U. S. v. Delaware, L. & W. R. R. Co.*, 152 Fed. 269 (C. C. N. Y., 1907). But see to the contrary *U. S. ex rel. Kellogg v. Lehigh Val. R. Co.*, 115 Fed. 373

§ 28. State as including Territory or District of Columbia.

It seems the better view that Territories and the District of Columbia are to be regarded as "States"²¹

(D. C. N. Y., 1902). See *Cincinnati, etc., Packet Co. v. Bay*, 200 U. S. 179, 26 Supm. 208, 50 L. ed. 428 (1906).

On this point seem overruled *Campbell v. Chicago, Milwaukee & St. Paul Ry. Co.*, 86 Iowa, 587, 53 N. W. 351, 17 L. R. A. 443 (1892); *Seawell v. Kansas City, Fort Scott, etc., R. R. Co.*, 119 Mo. 222, 24 S. W. 1002 (1893). And see *Burlington, Cedar Rapids, etc., Ry. Co. v. Dey*, 82 Iowa, 312, 339, 48 N. W. 98, 105, 12 L. R. A. 436, 444, 31 Am. St. Rep. 477, 494 (1891).

There also seem overruled the following decisions in cases of transmission of telegraphic messages: *State v. Western Union Tel. Co.*, 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570 (1893); *Leavell v. Western Union Tel. Co.*, 116 N. C. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. Rep. 798 (1895). In *Western Union Tel. Co. v. Reynolds*, 100 Va. 459, 41 S. E. 856, 93 Am. St. Rep. 971 (1902), such transmission by way of a relay office in another State was held not to be subject to the commerce clause. This was followed in *Western Union Tel. Co. v. Hughes*, 104 Va. 240, 51 S. E. 225 (1905), in enforcing under a State statute liability for failure to transmit a telegram.

In *State v. Seagraves*, 111 Mo. App. 353, 85 S. W. 925 (1905), the carrying of a pleasure party on a steamboat from and back to the same State was held not interstate commerce, though the boat might touch the shores of different States.

In *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Supm. 806, 36 L. ed. 672 (1892), affirming *Commonwealth v. Lehigh Valley R. R. Co.*, 129 Pa. St. 308, 18 Atl. 125 (1889), the power of taxation of a domestic railroad corporation under State authority was sustained as to receipts from transportation under the conditions in question. But this must be regarded as of doubtful authority in view of *Hanley v. Kansas City Southern Ry. Co.*, *supra*, where, however, in holding that it did not sustain the decisions above referred to, it was distinguished as the case of a tax confined to mileage wholly within the State.

As to transportation of liquors between points in State over route partly outside, for purpose of evading application of State statute, see *Cincinnati, N. O. & T. P. R. R. Co. v. Commonwealth*, 104 S. W. 394 (Ct. App. Ky., 1907).

²¹ So held as to commerce between a State and a Territory, in *Matter of Wilson*, 10 N. M. 32, 60 Pac. 73, 48 L. R. A. 417 (1900). In *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617, 23

as the word is used in the commerce clause, but the point may not be entirely free from doubt.²²

Supm. 214, 47 L. ed. 333 (1903) (see § 27), it was assumed that the power of Congress under the commerce clause "over commerce between Arkansas and the Indian Territory is not less than its power over commerce among the States." In *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Supm. 256, 32 L. ed. 637 (1889), affirming *Re Hennick*, 5 Mackey (D. C.), 489 (1887), the commerce clause was applied to a provision contained in an act of the legislative assembly of the District of Columbia. But see dissenting opinion of Miller, J. See also *Re Wilson*, 8 Mackey (D. C.), 341, 12 L. R. A. 624 (1890).

As to scope of Interstate Commerce Act, see section 1 thereof (24 Stat. L. 379).

²² In *U. S. v. Ames*, 95 Fed. 453 (C. C. Ill., 1899), a prohibition against causing lottery matter to be carried or transferred "from one State to another," was held not to include a Territory as a State. Held otherwise in *Neil v. Wilson*, 14 Oreg. 410, 12 Pac. 810 (1887), of provision of act of March 2, 1837, as to pilotage "upon waters which are the boundary line between two States."

In *Beitzell v. District of Columbia*, 21 App. Cas. (D. C.) 49 (1903); *U. S. v. Whelpley*, 125 Fed. 616 (D. C. Va., 1903), it was regarded as unnecessary to determine the question of application of the commerce clause to the District of Columbia. As to application to Territory, see *Ex parte Hanson*, 28 Fed. 127 (D. C. Oreg., 1886).

As to act of Territorial legislature, see *Farris v. Henderson*, 1 Okla. 384, 33 Pac. 380 (1893); *Butner v. Western Union Tel. Co.*, 2 Okla. 234, 248, 37 Pac. 1087, 1091 (1894). As to power of such legislature to tax "the means of interstate commerce," here the franchise of a corporation, see *Atlantic & Pacific R. R. Co. v. Lesueur*, 2 Ariz. 428, 19 Pac. 157, 1 L. R. A. 244 (1888).

As to effect of legislation by Congress in its capacity as local legislature for the District of Columbia, see § 54.

That Congress may prohibit the importation, thus, of intoxicating liquors into a Territory, see *Endleman v. U. S.*, 86 Fed. 456, 30 C. C. A. 186 (9th C. 1898); *U. S. v. Nelson*, 29 Fed. 202 (D. C. Alaska, 1886). As to such legislation, see also *U. S. v. Fifty Cases of Distilled Spirits*, 83 Fed. 1000 (D. C. Oreg., 1897). Compare *The Louisa Simpson*, 2 Sawy. 57, 15 Fed. Cas. No. 8,533 (1871).

§ 29. Commerce "with foreign nations."

The phrase "commerce with foreign nations" requires little elucidation.²³ "The power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."²⁴ It seems to follow that, so far at least as the commerce clause is concerned, "the two powers are of the same class and character, and equally extensive."²⁵ It is also said that the power as to commerce with foreign nations is "certainly as efficacious as that to regulate commerce with the Indian tribes."²⁶ Hence it may be said, as in

²³ In *U. S. v. Holliday*, 3 Wall. 407, 417, 18 L. ed. 182 (Dec. 1865), it was said to mean "commerce between citizens of the United States and citizens or subjects of foreign governments." This was approved in *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 23 L. ed. 543 (Oct. 1875). But this seems too narrow.

²⁴ *Brown v. Houston*, 114 U. S. 622, 630, 5 Supm. 1091, 1095, 29 L. ed. 257 (1885); *Pittsburg & Southern Coal Co. v. Bates*, 156 U. S. 577, 15 Supm. 415, 39 L. ed. 538 (1895).

²⁵ So stated in *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 482, 8 Supm. 689, 697, 31 L. ed. 700 (1888), where however it was said with reference to the absence of legislation by Congress (as distinguished from the actual exercise of power), as indicating its will that the subject in question shall be free from State regulation, that it may be that as to commerce among the States "the same inference is not to be drawn" as to commerce with foreign nations. In *Crutcher v. Kentucky*, 141 U. S. 47, 11 Supm. 851, 35 L. ed. 649 (1891), it was said that "no difference is perceivable between the two." See also *Gibbons v. Ogden*, 9 Wheat. 1, 194, 6 L. ed. 23 (1824). For argument that there is a distinction with reference to power to prohibit, see 2 Tucker on the Constitution, §§ 255, 256. See also Prentice & Egan's Commerce Clause, p. 304.

As to extraterritorial effect of regulation of commerce with foreign nations, see *U. S. v. Knight*, 3 Interst. Com. R. 801 (U. S. D. C. Ill., 1892); *Matter of Grand Trunk Ry. Co.*, 2 Interst. Com. R. 496 (1889).

²⁶ *Buttfield v. Stranahan*, 192 U. S. 470, 24 Supm. 349, 48 L. ed. 252 (1904), citing *U. S. v. Forty-three Gallons of Whiskey*, 93

case of commerce among the States, that the subject of regulation includes transportation from a point within a given State to a foreign nation, and *vice versa*.²⁷ It is of course to be borne in mind that commerce with foreign nations is subject to other provisions of the Constitution than the commerce clause, thus that "no tax or duty shall be laid on articles exported from any State,"²⁸ and that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."²⁹ And it has been intimated that with reference to commerce "among the States" there may exist limitations "resulting from other provisions of

U. S. 188, 23 L. ed. 846 (Oct. 1876). See *Buttfield v. Stranahan* as to extent of such power, and for illustrations of its exercise; thus, by means of embargo and tariff legislation and legislation by way of exercise of police power. As to power to enact protective tariff, see article in 27 Am. Law Rev. 519 (1893), by Conrad Reno. For argument that the power to levy duties on foreign imports is not included, see 2 Tucker on the Constitution, § 253.

²⁷ See *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L. ed. 23 (1824).

²⁸ Art. 1, § 9, which applies only to exports to foreign countries. *Dooley v. U. S.*, 183 U. S. 151, 22 Supm. 62, 46 L. ed. 128 (1901). See *Pace v. Burgess*, 92 U. S. 372, 23 L. ed. 657 (Oct. 1875). As to invalidity of provisions in War Revenue Act of 1898, under such prohibition, see *N. Y. & Cuba Mail S.S. Co. v. U. S.*, 125 Fed. 320 (D. C. N. Y., 1903); as to requirement of stamp tax on bill of lading, *Fairbank v. U. S.*, 181 U. S. 283, 21 Supm. 648, 45 L. ed. 862 (1901); provisions of Interstate Commerce Act, *Armour Packing Co. v. U. S.*, 153 Fed. 1, 13, 82 C. C. A. 135, 147 (8th C. 1907). See generally as to article 1, section 9, article in 2 Columbia Law Rev. 79 (1902), by E. B. Whitney.

²⁹ Art. 1, § 10. See *Gibbons v. Ogden*, 9 Wheat. 1, 200, 6 L. ed. 23 (1824); *State v. Allgeyer*, 110 La. Ann. 839, 34 So. 798 (1903); *Commonwealth v. Selliger*, 98 S. W. 1040 (Ct. App. Ky., 1907). As to effect of such provision as to taxation under State authority, see § 110.

the Constitution " not applicable to commerce " with foreign nations." ³⁰

§ 30. Commerce " with the Indian tribes."

The power to regulate commerce " with the Indian tribes " is granted in the same terms as is that to regulate commerce " with foreign nations." There seems no doubt that such power is at least as broad and as free from restrictions as that to regulate commerce " with foreign nations." ³¹ But as a matter, it would seem, of supposed practical necessity, the power as to commerce with the Indian tribes has been much more broadly construed than as to the other two classes of cases. Thus, as to them we have seen reason for thinking that commerce in the sense now considered has no necessary reference whatever to traffic or sales, and it is certain that neither class has reference to a mere sale wholly within a State. ³² But the power to regulate commerce with the Indian tribes has been regarded as including a sale wholly within the limits of a State, and without reference to transportation, even within such limits, of the article sold. ³³ Such a sale is

³⁰ *Buttfield v. Stranahan*, *supra*.

³¹ *U. S. v. Forty-three Gallons of Whiskey*, *infra*. Thus, see as to construction of railroad, *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 657, 10 Supm. 965, 971, 34 L. ed. 295 (1890). See generally *Worcester v. State of Georgia*, 6 Pet. 515, 559, 573, 580, 8 L. ed. 483 (Jan. T. 1832); *Cherokee Nation v. State of Georgia*, 5 Pet. 1, 18, 28, 43, 62, 8 L. ed. 25 (Jan. T. 1831); *U. S. v. Shanks*, 15 Minn. 369 (1870); *State v. Tassels*, Dudley (Ga.), 229 (1830).

³²As to "commerce with the Indian tribes" including mere sale of land, see *Murray v. Wooden*, 17 Wend. (N. Y.) 531 (1837); *Seneca Nation v. Christie*, 126 N. Y. 122, 142, 27 N. E. 275, 280 (1891).

³³ Thus, in *U. S. v. Holliday*, 3 Wall. 407, 18 L. ed. 182 (Dec. 1865), was sustained legislation of Congress prohibiting sales of liquor to Indians as applied to a sale within a State and without an Indian reservation. See *U. S. v. Belt*, 128 Fed. 168 (D. C. Pa., 1904); *U. S. v. Richard*, 1 Ariz. 31, 25 Pac. 517 (1871);

regarded as comprehended under the broad term *intercourse*. It seems, to say the least, unfortunate that the word "commerce" should receive a construction so radically at variance with that received by the same word as used elsewhere in the clause. May it not be that, in some instances at least, resort has been unnecessarily had to the commerce clause to sustain legislation affecting the Indian tribes and members thereof? It is certainly true that important legislation of this character has been sustained without any reference to the commerce clause, but rather on the ground of the position of such tribes as "wards of

U. S. v. Stofello, 8 Ariz. 461, 76 Pac. 611 (1904). So in *U. S. v. Shaw-Mux*, 2 Sawy. 364, 27 Fed. Cas. No. 16,268 (1873), as applied to sale of liquor by one Indian to another. So in *U. S. v. Forty-three Gallons of Whiskey*, 93 U. S. 188, 23 L. ed. 846 (Oct. 1876), reversing 25 Fed. Cas. No. 15,136 (D. C. Minn., 1874), in case of a cession of lands by Indians by treaty, was sustained a provision in the treaty that laws prohibiting the introduction and sale of spirituous liquors in the Indian country should be in force in "the country ceded." So held, though such ceded territory was a portion of the territory of a State. But in *Matter of Heff*, 197 U. S. 488, 508, 25 Supm. 506, 512, 49 L. ed. 848 (1905), the power of regulation was held not to extend to sale of liquor to an allottee Indian to whom had been granted the privilege of citizenship. This seems to overrule *Farrell v. U. S.*, 110 Fed. 942, 49 C. C. A. 183 (8th C. 1901). See *Renfrow v. U. S.*, 3 Okla. 161, 41 Pac. 88 (1895). See also as to legislation by Congress respecting sale of liquor to Indians, *U. S. v. Seveloff*, 2 Sawy. 311, 27 Fed. Cas. No. 16,252 (1872). As to prohibition of such sale under law of Territory, see *Territory v. Guyott*, 9 Mont. 46, 22 Pac. 134 (1889).

In *Foster v. Commissioners of Blue Earth County*, 7 Minn. 140 (1862), was held invalid the imposition of a State tax upon the goods of one trading with Indians. As to State statute prohibiting sale of liquor to Indians, see *State v. Wise*, 70 Minn. 99, 72 N. W. 843 (1897).

Hardly sustainable seems *Hicks v. Ewhartollah*, 21 Ark. 106 (1860), where an act of Congress invalidating certain executory contracts by Indians was held invalid, as applied to a contract entered into within the limits of the State. See *Taylor v. Drew*, 21 Ark. 485 (1860); *Jones v. Eisler*, 3 Kan. 134 (1865).

the nation," "in a state of pupilage."³⁴ To that extent the power of Congress as to the Indian tribes and members thereof is beyond the scope of this treatise.

In *The Narragansett Indians*, 20 R. I. 715, 40 Atl. 347 (1898), a Rhode Island statute providing for an agreement between the State and certain Indians was sustained as not in conflict with the commerce clause.

As to effect of U. S. R. S., §§ 2103, 2104, 2105, with reference to contracts with Indian tribes or individual Indians, see *Rollins v. Eastern Band of Cherokee Indians*, 87 N. C. 229 (1882).

That the power does not include mere punishment of crimes committed by Indians against each other "without any reference to their relation to any kind of commerce," see *U. S. v. Kagama*, 118 U. S. 375, 6 Supm. 1109, 30 L. ed. 228 (1886). But legislation providing for the punishment of a crime committed by a white man on the person or property of an Indian, or *vice versa*, was sustained in *U. S. v. Barnhart*, 22 Fed. 285 (C. C. Oreg., 1884); *U. S. v. Bridleman*, 7 Fed. 894 (D. C. Oreg., 1881); *U. S. v. Martin*, 14 Fed. 817 (D. C. Oreg., 1883). See *U. S. v. Cisna*, 1 McLean, 254, 25 Fed. Cas. No. 14,795 (1835). As to crime by one white person against another, see *U. S. v. Bailey*, 1 McLean, 234, 24 Fed. Cas. No. 14,495 (1834). As to application of criminal laws of a State to tribal Indians living under the charge of the general government on a reservation set apart for that purpose, see *U. S. v. Sa-Coo-Da-Cot*, 1 Dill. 271, 27 Fed. Cas. No. 16,212 (1870); *State v. Campbell*, 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169 (1893); *State v. Spotted Hawk*, 22 Mont. 33, 44, 55 Pac. 1026, 1028 (1899); *State v. Little Whirlwind*, 22 Mont. 425, 56 Pac. 820 (1899). See also as to application of criminal laws of State, *Re Blackbird*, 109 Fed. 139 (D. C. Wis., 1901); *Caldwell v. State*, 1 Stew. & P. (Ala.) 327, 375, 430 (1832); *State v. Foreman*, 8 Yerg. (Tenn.) 256, 316, 337 (1835); *State v. Doxtater*, 47 Wis. 278, 2 N. W. 439 (1879); *State v. Harris*, 47 Wis. 298, 2 N. W. 543 (1879).

³⁴ Thus, for instance, in *Stephens v. Cherokee Nation*, 174 U. S. 445, 484, 19 Supm. 722, 736, 43 L. ed. 1041 (1899); *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 306, 23 Supm. 115, 119, 47 L. ed. 183 (1902). See *U. S. v. Kagama*, 118 U. S. 375, 6 Supm. 1109, 30 L. ed. 228 (1886); *U. S. v. Rickert*, 188 U. S. 432, 443, 23 Supm. 478, 482, 47 L. ed. 532 (1903); *Matter of Heff*, 197 U. S. 488, 498, 25 Supm. 506, 507, 49 L. ed. 848 (1905). See *Ryan v. Knorr*, 19 Hun (N. Y.), 540 (1880).

CHAPTER II.

THE POWER OF CONGRESS.

- SECTION 31.** Nature of power to regulate.
32. Exercise of power, as limited by other constitutional provisions; *e. g.*, Fifth Amendment; prohibition of preference to ports of State.
 33. Power to prohibit.
 34. Exclusion or expulsion of aliens.
 35. "Rule of free competition;" legislation against restrictions upon competition; Anti-Trust Act.
 36. Registration of trade-marks.
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 38. Conduct and liability of those engaged in commerce; Interstate Commerce Act.
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 40. Punishment of crimes.
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 43. Admiralty and maritime jurisdiction.
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 47. Establishment and maintenance of means of transportation; creation and licensing of corporations.
 48. Removing or prohibiting obstructions to navigation.
 49. Authorizing placing of obstructions to navigation.
 50. Effectuating improvements in navigation.
 51. Duty to make compensation for property taken in exercise of power to improve navigation.
 52. Authorization of construction of bridges.

§ 31. Nature of power to regulate.

Whatever "the reasons which may have caused the framers of the Constitution to repose the power to regulate commerce in Congress," it is said that such reasons "do not affect or limit the extent of the power itself."¹ "Regulate" is defined as "to adjust by

¹ *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 228, 20 Supm. 96, 102, 44 L. ed. 136 (1899).

rule, method, or established mode; govern by or subject to certain rules or restrictions; direct.”² The idea of prescribing a rule is involved in the etymology of the word. The power to regulate commerce is defined to be “the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects therefore upon which the power may be exerted are of infinite variety.”³ It is said to be “vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because in their opinion such regulations may not be the best or most

² Century Dictionary.

³ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 5 Supm. 826, 828, 29 L. ed. 158 (1885). See also *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996 (Dec. T. 1851); *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347 (Oct. 1875); *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 23 L. ed. 543 (Oct. 1875); *Leisy v. Hardin*, 135 U. S. 100, 108, 10 Supm. 681, 683, 34 L. ed. 128 (1890); *Hopkins v. U. S.*, 171 U. S. 578, 597, 19 Supm. 40, 47, 43 L. ed. 290 (1898).

In *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Supm. 1126, 30 L. ed. 1187 (1887), after pointing out certain peculiar characteristics of communication by telegraph, as compared with “other commerce,” it was said that “the regulations suitable for

effective that could be employed.”⁴ And it is said that “Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it.”⁵ But while this vast power has, as to commerce with foreign nations and with the Indian tribes, long been exercised with comparative frequency, it has until recently been otherwise as to “commerce among the States.” It is even said that prior to the enactment of the Interstate Commerce Act Congress had “refrained from the passage of any very important regulation upon this subject, except perhaps the statutes regulating steamboats and their occupation upon the navigable waters of the country.”⁶

one of these kinds of commerce would be entirely inapplicable to the other.”

⁴ *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 353, 23 Supm. 321, 325, 47 L. ed. 492 (1903). See also *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23 (1824); *Leisy v. Hardin*, *supra*; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 471, 473, 14 Supm. 1125, 1131, 1132, 38 L. ed. 1047 (1894); *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 228, 20 Supm. 96, 102, 44 L. ed. 136 (1899); *Cummings v. Chicago*, 188 U. S. 410, 430, 23 Supm. 472, 477, 47 L. ed. 525 (1903); *Buttfield v. Stranahan*, 192 U. S. 470, 24 Supm. 349, 48 L. ed. 525 (1904); *Northern Securities Co. v. U. S.*, 193 U. S. 197, 336, 24 Supm. 436, 456, 48 L. ed. 679 (1904). *Howard v. Illinois Central R. R. Co.* (Supm. Ct. U. S., 1908). In *Gibbons v. Ogden* it was said to be obvious (p. 204) that Congress in the exercise of such power “may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State.”

As to such power including power to make government promises tender in payment of private debts, see *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400, 510 (1863).

See, generally, article in 17 Yale Law Rev. 139 (1908), by P. C. Knox.

⁵ *Interstate Commerce Commission v. Brimson*, *supra*, sustaining provisions of the Interstate Commerce Act.

⁶ *Fargo v. Michigan*, 121 U. S. 230, 239, 7 Supm. 857, 860, 30 L. ed. 888 (1887). For instances of such legislation, see *Bowman*

Recently however the power has been much more frequently exercised as to commerce among the States.

§ 32. Exercise of power, as limited by other constitutional provisions; e. g., Fifth Amendment; prohibition of preference to ports of State.

Although the power conferred by the commerce clause is said to be "coextensive with the subject on which it acts,"⁷ it is clearly recognized that it is subject to "limitations or restrictions" "prescribed by" other provisions of the Constitution,⁸ thus notably of the Fifth Amendment, that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."⁹

v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 484, 8 Supm. 689, 698, 31 L. ed. 700 (1888). As to regulation of commerce with States in insurrection during period of Civil War, see *Folsom v. U. S.*, 4 Ct. of Cl. 366 (Dec. T. 1868).

⁷ Marshall, C. J., in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678 (1827).

⁸ *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 362, 23 Supm. 321, 329, 47 L. ed. 492 (1903). See also *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505, 571, 19 Supm. 25, 32, 43 L. ed. 259 (1898).

As to the principles that should control the judiciary when determining whether a particular act of Congress, avowedly adopted in execution of that power, is consistent with the fundamental limitations of the Constitution, see *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 471, 14 Supm. 1125, 1131, 38 L. ed. 1047 (1894), quoting from *McCulloch v. Maryland*, 4 Wheat. 316, 421, 423, 4 L. ed. 579 (1819).

In *Oyster Police Steamers of Maryland*, 31 Fed. 763 (D. C. Md., 1887); affirmed in *Governor Robert McLane v. U. S.*, 35 Fed. 926 (C. C. Md., 1888), the power was held to extend to vessels owned by a State, against the objection that they were "the public vessels of a sovereign power, and used solely as instruments of government."

⁹ See *Buttfield v. Stranahan*, 192 U. S. 470, 24 Supm. 349, 48 L. ed. 525 (1904); *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 26 Supm. 66, 50 L. ed. 246 (1905), reversing *Greenwich Ins. Co.*

But while the word "liberty" as here used is not "confined to the mere liberty of person, but includes, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business," such constitutional guaranty does not prevent Congress, in the exercise of power under the commerce clause, from legislating, even by way of prohibition, upon the subject of such contracts in respect to commerce within the scope thereof, as "directly affect and regulate that commerce."¹⁰ The

v. Carroll, 125 Fed. 121 (C. C. Iowa, 1903). As to duty to make such compensation, see § 51. It was said in *Crutcher v. Kentucky*, 141 U. S. 47, 11 Supm. 851, 35 L. ed. 649 (1891), that "to carry on interstate commerce * * * is a right which every citizen of the United States is entitled to exercise *under the Constitution* and laws of the United States."

As to effect of provision of art. 4, § 2, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," see 2 Tucker on the Constitution, §§ 255, 256.

¹⁰ *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 228-234, 20 Supm. 96, 102-105, 44 L. ed. 136 (1899), affirming *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 294, 29 C. C. A. 141, 163, 46 L. R. A. 122, 137 (1898), which reversed 78 Fed. 712 (C. C. Tenn., 1897). Here was sustained the application of the Federal anti-trust act to a combination that eliminated competition among bidders for a contract that involved transportation within the scope of the commerce clause. See also as to distinction between such cases and those illustrated by *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Supm. 249, 39 L. ed. 325 (1895), and other decisions considered in § 25. See also *Bement v. National Harrow Co.*, 186 U. S. 70, 92, 22 Supm. 747, 755, 46 L. ed. 1058 (1902); *Northern Securities Co. v. U. S.*, 193 U. S. 197, 332, 24 Supm. 436, 454, 48 L. ed. 679 (1904); *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. 816, 825 (C. C. Neb., 1901); *State v. Smiley*, 65 Kan. 240, 260, 69 Pac. 199, 205, 67 L. R. A. 903, 912 (1902).

See as to annulling existing contracts *Railroad Co. v. Richmond*, 19 Wall. 584, 22 L. ed. 173 (Oct. 1873); *Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co.*, 37 Fed. 567, 633, 2 L. R. A. 289, 326 (C. C. Ky., 1889); *Bullard v. Northern Pacific R. R. Co.*,

power conferred by the commerce clause is also subject to the limitations or restrictions prescribed by the provision that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."¹¹ This is however of comparatively little importance, being, it would seem, applicable to, "not discrimination between individual ports within the same or different States, but discrimination between States."¹² It scarcely needs pointing out that it operates by way of restriction upon Congress only, but not upon the States.¹³

§ 33. Power to prohibit.

It may well be that, *so far as concerns the grant of power under the commerce clause*, considered by itself, the power to prohibit transportation within the scope thereof is absolute.^{13a} But, however it may be as to

10 Mont. 168, 25 Pac. 120, 11 L. R. A. 246 (1890); *Mottley v. Louisville & N. R. R. Co.*, 150 Fed. 406 (C. C. Ky., 1907); *Southern Wire Co. v. St. Louis Bridge & Tunnel R. R. Co.*, 38 Mo. App. 191 (1889); *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374, 458, 59 N. W. 838, 860 (1894); *Fitzgerald v. Grand Trunk R. R. Co.*, 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70 (1890).

¹¹ Art. 1, § 9, par. 6.

¹² *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 435, 15 L. ed. 435 (Dec. T. 1855). In *Armour Packing Co. v. U. S.*, 153 Fed. 1, 15, 82 C. C. A. 135, 149 (8th C. 1907), the Interstate Commerce Act was held not in conflict with such provision. See also as to such provision *Gibbons v. Ogden*, 9 Wheat. 1, 191, 6 L. ed. 23 (1824); *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 6 Supm. 1114, 30 L. ed. 237 (1886); *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388, 7 Supm. 254, 30 L. ed. 447 (1886). As to its application to transportation by land, see Prentice & Egan's Commerce Clause, p. 306.

¹³ *Morgan's Steamship Co. v. Louisiana Board of Health*, *supra*.

^{13a} In *U. S. v. The William*, 28 Fed. Cas. No. 16,700 (D. C. Mass., 1808), the power to so "regulate" was held sufficient to sustain the "embargo laws" of 1807 and 1808. See *Gibbons v. Ogden*, 9 Wheat. 1, 191, 6 L. ed. 23 (1824); 2 Tucker on the Con-

commerce with foreign nations, in view of provisions specially applicable thereto, it seems reasonably clear that, at least as to commerce among the States, restrictions are furnished by the Fifth Amendment already considered. It has not yet been established, nor is it likely to be, that "Congress may arbitrarily exclude from commerce among the States any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another,"¹⁴ thus, without reference to any ground of public policy, such as, for instance, protection of the public health or morals, or prevention of restrictions upon competition. But, whatever may be the limitations upon the power to prohibit, imposed by the Fifth Amendment or otherwise, it seems clear enough that, even as to commerce among the States, at least "in some circumstances regulation may properly take the form and have the effect of prohibition."¹⁵ As a State may, for instance, prohibit the transportation of diseased cattle within its boundaries, so Congress may prohibit the trans-

stitution, § 254. See discussion of *U. S. v. The William in Wyhamer v. People*, 20 Barb. (N. Y.) 567, 611 (1855).

As to prohibition of importation of article inferior to prescribed standard, see § 37.

¹⁴ *Lottery Case, infra* (188 U. S. 362, 23 Supm. 329).

¹⁵ *Northern Securities Co. v. U. S.*, 193 U. S. 197, 335, 24 Supm. 436, 456, 48 L. ed. 679 (1904). Thus of "the prohibition of unjust charges, discriminations, or preferences" contained in the Interstate Commerce Act. See *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 472, 14 Supm. 1125, 1131, 38 L. ed. 1047 (1894). See also *Hamilton v. Dillin*, 21 Wall. 73, 92, 22 L. ed. 528 (Oct. 1874); *Chicago, B. & Q. R. R. Co. v. Attorney-General*, 5 Fed. Cas. No. 2,666 (C. C. Iowa, 1875); affirmed in *Chicago, Burlington & Quincy R. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94 (Oct. 1876). See article in 17 Yale Law Rev. 139 (1908), by P. C. Knox.

portation of such cattle from State to State,¹⁶ and so generally of articles injurious to health or morals.¹⁷

¹⁶ Thus by provisions of act of May 29, 1884 (23 Stat. L. 31), for the establishment of a bureau of animal industry. This was held constitutional in *U. S. v. Slater*, 123 Fed. 115 (D. C. Nev., 1903). See also as to such act *Mullen v. Western Union Beef Co.*, 173 U. S. 116, 19 Supm. 404, 43 L. ed. 635 (1899), dismissing writ of error from 9 Colo. App. 497, 49 Pac. 425 (1897); *Reid v. Colorado*, 187 U. S. 137, 23 Supm. 92, 47 L. ed. 108 (1902); *Cotting v. Kansas City Stock-Yards Co.*, 79 Fed. 679 (C. C. Kan., 1897); 82 Fed. 839, 843 (C. C. Kan., 1897); *U. S. v. Hoover*, 133 Fed. 950 (D. C. Neb., 1904). See also act of August 30, 1890 (26 Stat. L. 416); act of July 24, 1897 (30 Stat. L. 210); act of February 2, 1903 (32 Stat. L. 791).

As to validity of regulations by Secretary of Agriculture under act of February 2, 1903, see *Illinois Central R. R. Co. v. McKendree*, 203 U. S. 514, 27 Supm. 153, 51 L. ed. 298 (1906); *Illinois Central R. R. Co. v. Edwards*, 203 U. S. 531, 27 Supm. 159, 51 L. ed. 305 (1906).

In *Davis v. Texas & Pacific Ry. Co.*, 12 Tex. Civ. App. 427, 34 S. W. 144 (1896), the act of May 29, 1884 was held inapplicable to an interstate shipment. As to act of March 3, 1891 (26 Stat. L. 1044, 1049), see *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 18 Supm. 488, 42 L. ed. 878 (1898); *Cotting v. Kansas City Stock-Yards Co.*, 82 Fed. 839, 843 (C. C. Kan., 1897).

¹⁷ On this ground in *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 356, 23 Supm. 321, 327, 47 L. ed. 492 (1903), was sustained the act of March 2, 1895 (28 Stat. L. 963), prohibiting as a criminal offense the carriage of lottery tickets from State to State, such act being here applied to carriage by an express company engaged in transportation. See also *Francis v. U. S.*, 188 U. S. 375, 23 Supm. 334, 47 L. ed. 508 (1903), reversing *Reilley v. U. S.*, 106 Fed. 896, 46 C. C. A. 25 (6th C. 1901). See also act of July 24, 1897 (30 Stat. L. 208, 211).

Such unquestionable power of Congress has not infrequently been exercised, as conspicuously in the act of June 30, 1906 (34 Stat. L. 768), "preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors." See also act of August 30, 1890 (30 Stat. L. 415); act of June 30, 1906 (34 Stat. L. 685). So such power has been exercised with reference to *obscene literature, etc.* Act of February 8, 1897 (29 Stat. L. 512); act of February 8, 1905 (33

And, as will presently be seen, Congress may doubtless, by way of giving effect to "the rule of free competition," prohibit transportation under conditions of monopoly.

§ 34. Exclusion or expulsion of aliens.

It is established that "Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers."¹⁸ It is, to say the

Stat. L. 705). Such legislation was sustained in *U. S. v. Popper*, 98 Fed. 423 (D. C. Cal., 1899). To *false labeling or branding*. Act of July 1, 1902 (32 Stat. L. 632); act of June 13, 1906 (34 Stat. L. 260). See also act of July 24, 1897 (30 Stat. L. 207); act of February 20, 1905 (33 Stat. L. 730); act of February 21, 1905 (33 Stat. L. 732). To *insect pests*. Act of March 3, 1905 (33 Stat. L. 1269). To *opium*. Act of February 23, 1897 (24 Stat. L. 409). As to articles manufactured by convict labor, see act of July 24, 1897 (30 Stat. L. 208, 211).

In *U. S. v. Marigold*, 9 How. 560, 13 L. ed. 257 (Jan. T. 1850), was sustained an act prohibiting bringing into the United States false, forged, and counterfeited coins.

As to quarantine regulations of States as affected by Congressional legislation, see § 95; article in 4 Mich. Law Rev. 189 (1906), by W. E. Walz. See generally as to power to prohibit, articles in 38 Am. Law Rev. 194 (1904), by W. A. Sutherland; 37 Id. 503 (1903), by Alfred Russell; in 1 Mich. Law Rev. 615 (1903), by E. B. Whitney.

¹⁸ *U. S. ex rel. Turner v. Williams*, 194 U. S. 279, 24 Supm. 719, 48 L. ed. 979 (1904). See also as to exclusion of aliens, *Chinese Exclusion Case*, 130 U. S. 581, 9 Supm. 623, 32 L. ed. 1068 (1889); *Lem Moon Sing v. U. S.*, 158 U. S. 538, 543, 15 Supm. 967, 969, 39 L. ed. 1082 (1895); *Fong Yue Ting v. U. S.*, 149 U. S. 698, 712, 13 Supm. 1016, 1021, 37 L. ed. 905 (1893); *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 659, 12 Supm. 336, 338, 35 L. ed. 1146 (1892); *Pearson v. Williams*, 202 U. S. 281, 26 Supm. 608, 50 L. ed. 1029 (1906); *Re Sing Lee*, 54 Fed. 334 (D. C.

least, not clear that the exercise of such power is to be referred to the commerce clause, and not rather to "the accepted principle of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."^{18a} Such power of exclusion or expulsion has been freely exercised, especially as to the Chinese.

Mich., 1893); *U. S. v. Williams*, 83 Fed. 997 (D. C. Cal., 1897); *U. S. v. Chu Chee*, 93 Fed. 797, 35 C. C. A. 613 (9th C. 1899); *U. S. v. Lee Huen*, 118 Fed. 442 (D. C. N. Y., 1902); *Re Sing Tuck*, 126 Fed. 386 (C. C. N. Y., 1903); *U. S. v. Foong King*, 132 Fed. 107 (D. C. Ga., 1904); *Chan Gun v. U. S.*, 9 App. Cas. (D. C.) 290 (1896).

By act of February 20, 1907 (34 Stat. L. 898), provision is made in detail by way of regulation of the "immigration of aliens into the United States." As to act of March 3, 1903 (32 Stat. L. 1213), see *Hopkins v. Fachant*, 130 Fed. 839, 65 C. C. A. 1 (9th C. 1904). In *International Mercantile Marine Co. v. Stranahan*, 155 Fed. 428 (C. C. N. Y., 1907), section 9 was sustained and applied.

In *Head Money Cases*, 112 U. S. 580, 5 Supm. 247, 28 L. ed. 798 (1884), affirming 18 Fed. 135 (C. C. N. Y., 1883), it was the commerce clause that was referred to as furnishing the basis for the validity of the act of August 3, 1882 (22 Stat. L. 214), levying a duty for every passenger, not a citizen of the United States, coming by steam or sail vessel from a foreign port to any port within the United States. See also as to such act, *People v. Compagnie Générale Transatlantique*, 107 U. S. 59, 2 Supm. 87, 27 L. ed. 383 (1883), affirming 10 Fed. 357 (C. C. N. Y., 1882); *Thingvalla Line v. U. S.*, 24 Ct. of Cl. 255, 5 L. R. A. 135 (1889); *U. S. v. Lavarrello*, 149 Fed. 297 (C. C. N. Y., 1906).

In *Lees v. U. S.*, 150 U. S. 476, 14 Supm. 163, 37 L. ed. 1150 (1893), was sustained the act of February 26, 1885 (23 Stat. L. 332), forbidding under a penalty the importation and migration of foreigners and aliens under contract to perform labor in this country. See also as to such act, *Holy Trinity Church v. U. S.*, 143 U. S. 457, 12 Supm. 511, 36 L. ed. 226 (1892); *U. S. v. Craig*, 28 Fed. 795 (C. C. Mich., 1886); *Re Cummings*, 32 Fed. 75 (C. C. N. Y., 1887); *Re Florio*, 43 Fed. 114 (C. C. N. Y., 1890).

^{18a} *U. S. ex rel. Turner v. Williams*, *supra*.

§ 35. "Rule of free competition;" legislation against restrictions upon competition; Anti-Trust Act.

The power to regulate commerce includes the power to prescribe therefor "the rule of free competition,"¹⁹ and such power has been conspicuously exercised in the enactment of the so-called "Federal anti-trust act," which prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Also "monopolizing, or attempting to monopolize, or combining or conspiring with any other person or persons, to monopolize any part of" such trade or commerce.²⁰ The extent of the power to prescribe "the rule of free competition"

¹⁹ *Northern Securities Co. v. U. S.*, *infra* (193 U. S. 337, 24 Supm. 457).

²⁰ Act of July 2, 1890 (26 Stat. L. 209), entitled "An act to protect trade and commerce against unlawful restraints and monopolies." See also act of August 27, 1894 (28 Stat. L. 570), confined however to importations from foreign countries.

The act of 1890 was sustained as authorized by the commerce clause, in *Northern Securities Co. v. U. S.*, 193 U. S. 197, 335, 24 Supm. 436, 456, 48 L. ed. 679 (1904), where it was held applicable to the organization of a corporation under the laws of a State by stockholders of competing railroad corporations, the corporation thus organized to hold the stock of the constituent corporations. So in *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 17 Supm. 540, 41 L. ed. 1007 (1897), reversing 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73 (8th C. 1893), which affirmed 53 Fed. 440 (C. C. Kan., 1892); *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505, 19 Supm. 25, 43 L. ed. 259 (1898), to contracts or combinations between competing railroad corporations for the purpose of establishing and maintaining rates of transportation.

For other instances of application of the act, see *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Supm. 96, 44 L. ed. 136 (1899), affirming *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122 (6th C. 1898); *Montague v. Lowry*, 193 U. S. 38, 24 Supm. 307, 48 L. ed. 608 (1904), affirming *W. W. Montague & Co. v. Lowry*, 115 Fed. 27, 52 C. C. A. 621, 63 L. R. A. 58 (9th C. 1902), which affirmed *Lowry v. Tile*,

remains to be clearly determined by the courts.²¹ But, according to the view of "monopolies" currently accepted, a State may doubtless prohibit the transportation within its boundaries of what is otherwise considered a useful article of commerce, thus, food or clothing, providing such transportation is under conditions of monopoly, thus, by those in substantial control of the supply of the commodity that is the subject of transportation. In this view Congress may likewise doubtless prohibit transportation among the States under like conditions. Thus doubtless it may prohibit the transportation of wheat from Chicago to

Mantel & Grate Assoc., 106 Fed. 38 (C. C. Cal., 1900); *Swift v. U. S.*, 196 U. S. 375, 25 Supm. 276, 49 L. ed. 518 (1905), affirming *U. S. v. Swift*, 122 Fed. 529 (C. C. Ill., 1903); *Bement v. National Harrow Co.*, 186 U. S. 70, 92, 22 Supm. 747, 755, 46 L. ed. 1058 (1902); *U. S. v. Jellico Mountain Coal & Coke Co.*, 46 Fed. 432, 12 L. R. A. 753 (C. C. Tenn., 1891); *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. 994, 26 L. R. A. 158 (C. C. La., 1893); *U. S. v. Elliott*, 62 Fed. 801 (C. C. Mo., 1894); *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 821 (C. C. Ohio, 1894); *U. S. v. Debs*, 64 Fed. 724, 745 (C. C. Ill., 1894); *U. S. v. Coal Dealers' Assoc.*, 85 Fed. 252 (C. C. Cal., 1898); *U. S. v. Chesapeake & O. Fuel Co.*, 105 Fed. 93 (C. C. Ohio, 1900); affirmed as *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610, 53 C. C. A. 256 (6th C. 1902); *Delaware, L. & W. R. R. Co. v. Frank*, 110 Fed. 689 (C. C. N. Y., 1901); *City of Atlanta v. Chattanooga Foundry, etc., Co.*, 127 Fed. 23, 61 C. C. A. 387, 64 L. R. A. 721 (6th C. 1903); *Ellis v. Inman*, 131 Fed. 182, 65 C. C. A. 488 (9th C. 1904), reversing 124 Fed. 956 (C. C. Oreg., 1903); *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, 192 (C. C. Ky., 1905); *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assoc.*, 152 Fed. 864, 81 C. C. A. 658, 10 L. R. A. N. S. 972 (3d C. 1907); *Getz v. Federal Salt Co.*, 147 Cal. 115, 81 Pac. 416 (1905); *White Star Line v. Star Line of Steamers*, 141 Mich. 604, 105 N. W. 135, 113 Am. St. Rep. 551 (1905).

See also prohibition of section 5 of Interstate Commerce Act against pooling of freights.

²¹ See as to such power article in 17 Harv. Law Rev. 83 (1903), by A. L. Humes.

Boston, or of shoes from Boston to Chicago, in case of those transporting wheat from Chicago to Boston being in substantial control of the supply of wheat transported from Chicago to Boston, and so of transportation of shoes from Boston to Chicago. There might well be an abundant supply of wheat at other points than Chicago, and such wheat might well be transported from such other points to Boston. But, so long as such wheat is not present at Chicago under conditions under which it may be transported to Boston, it is not apparent that the application of the rule of regulation as above stated is necessarily affected. But the above considerations seem to furnish no warrant for the conclusion that, in the absence of conditions of monopoly as to *transportation*, prohibition thereof is within the power of Congress, merely because of *production* of the article transported being under conditions of monopoly. To illustrate, there might be a monopoly of the production of shoes, whether carried on in one or more States. But it by no means necessarily follows that there is a monopoly of *transportation* of such shoes. The producer might sell them within the State where produced to persons among whom there might be very active competition as to transportation into other States.

§ 36. Registration of trade-marks.

Congress has provided for the registration of trade-marks used in commerce within the scope of the commerce clause.²² As a trade-mark pertains to the status or condition of an article, and not at all, at least not necessarily, to the transportation thereof, it may well

²² Act of February 20, 1905 (33 Stat. L. 724); of May 4, 1906 (34 Stat. L. 168); of March 2, 1907 (34 Stat. L. 1251). For former provision see act of March 3, 1881 (21 Stat. L. 502).

be said that it is at least "fairly doubtful" ²³ "whether the trade-mark bears such a relation to commerce in general terms as to bring it within Congressional control, when used or applied to the classes of commerce which fall within that control." ²⁴

§ 37. Inspection.

It being, as already seen, within the power of Congress to prohibit the transportation, thus, from State to State, of articles injurious to health or morals, it seems to necessarily follow that it is likewise within its power to provide for the inspection of articles that are the subject of such transportation, in order to determine whether it may properly be prohibited. ²⁵

²³ So stated in *Illinois Watch-Case Co. v. Elgin Nat. Watch Co.*, 94 Fed. 667, 35 C. C. A. 237 (7th C. 1899); affirmed in *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 Supm. 270, 45 L. ed. 365 (1901), without however any discussion of the point. And in *Warner v. Searle, etc., Co.*, 191 U. S. 195, 24 Supm. 79, 48 L. ed. 145 (1903), it was regarded as unnecessary to pass on the point.

See also as to the act of 1881, *U. S. v. Koch*, 40 Fed. 250, 5 L. R. A. 130 (C. C. Mo., 1889); *Ryder v. Holt*, 128 U. S. 525, 9 Supm. 145, 32 L. ed. 529 (1888); *Sarrazin v. Irby Cigar, etc., Co.*, 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541 (5th C. 1899); *Hennessy v. Braunschweiger*, 89 Fed. 664 (C. C. Cal., 1898).

²⁴ *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550 (Oct. 1879), where legislation not confined in its application to trade-marks used in the classes of commerce specified in the commerce clause was held unconstitutional. See also *Leidersdorf v. Flint*, 8 Biss. 327, 15 Fed. Cas. No. 8,219 (1878); *Perlberg v. Smith*, 70 N. J. Eq. 638, 62 Atl. 442 (1905); *Brennan v. Emery-Bird-Thayer Co.*, 99 Fed. 971 (C. C. Mo., 1900).

²⁵ As to inspection under authority of State, see § 93. By the act of March 4, 1907 (34 Stat. L. 1260), provision is made in detail for the inspection of *cattle and other animals and the products thereof*. See also act of March 3, 1891 (26 Stat. L. 1089), as amended by act of March 2, 1895 (28 Stat. L. 732); also act of August 30, 1890 (26 Stat. L. 417); act of March 2, 1895 (28 Stat. L. 732); act of June 3, 1902 (32 Stat. L. 289). As to effect

But such power does not include the inspection of an article in course of production, merely because intended for transportation to a point outside the State.²⁶

of act of March 3, 1891, with reference to State legislation regulating charges of stockyards company, see *Cotting v. Kansas City Stock-Yards Co.*, 82 Fed. 839 (C. C. Kan., 1897).

Provision has also been made for inspection of *pork and bacon*. Act of August 30, 1890 (26 Stat. L. 414). *Process or renovated butter*. Act of May 9, 1902 (32 Stat. L. 196). See *U. S. v. Bohl*, 125 Fed. 625 (D. C. Conn., 1903); *U. S. v. Green*, 137 Fed. 179 (D. C. N. Y., 1905. See as to prohibition against removing or defacing stamps, marks, etc.). *Dairy products*. Act of June 3, 1902 (32 Stat. L. 290); act of March 4, 1907 (34 Stat. L. 1260). *Foods, drugs, and liquors*. Act of June 3, 1902 (32 Stat. L. 296). By act of March 3, 1905 (33 Stat. L. 874), provision is made for inspection to prevent importation from foreign countries of articles dangerous to health or falsely labeled or branded as to contents or place of production. So by R. S., §§ 2933, 2938, for examination of imported drugs. See as to *oleomargarine* act of August 2, 1886 (24 Stat. L. 209); *Dougherty v. U. S.*, 108 Fed. 56, 47 C. C. A. 195 (3d C. 1901). *Cheese*. Act of June 6, 1896 (29 Stat. L. 253). *Viruses, serums, toxins, etc.* Act of July 1, 1902 (32 Stat. L. 728). *Cattle or other live stock*. Act of March 3, 1905 (33 Stat. L. 1264); *Wakefield v. Chicago I. & L. Ry. Co.*, 104 S. W. 778 (Ct. App. Ky., 1907).

In *Buttfield v. Stranahan*, 192 U. S. 470, 24 Supm. 349, 48 L. ed. 252 (1904), was sustained act of March 2, 1897 (29 Stat. L. 604), providing for the establishment of standards of purity, quality, and fitness for consumption, of teas imported into the United States and prohibiting the importation of tea inferior to such standards, it being held that there was no violation of "the due process clause of the Constitution." Followed in *Buttfield v. Bidwell*, 192 U. S. 498, 24 Supm. 356, 48 L. ed. 536 (1904); *Buttfield v. U. S.*, 192 U. S. 499, 24 Supm. 356, 48 L. ed. 537 (1904). The same had been decided in *Sang Lung v. Jackson*, 85 Fed. 502 (C. C. Cal., 1898).

²⁶ Thus in *U. S. v. Boyer*, 85 Fed. 425, 432 (D. C. Mo., 1898), seems to have been held invalid as unauthorized by the commerce clause or otherwise, the provisions of the act of March 3, 1891, *supra*, for inspection prior to slaughter of animals, the carcasses or products of which "are to be transported and sold" outside the State. See § 25.

§ 38. Conduct and liability of those engaged in commerce; Interstate Commerce Act.

Obviously the power conferred by the commerce clause extends, as to be effective it must extend, "to the persons who conduct it, as well as to the instruments used."²⁷ And it has been frequently exercised by way of imposition of duties upon, or regulation of existing duties of, those engaged in commerce; so, too, of the imposition or regulation of their liabilities.²⁸

²⁷ *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996 (Dec. T. 1851).

²⁸ Thus notably the provisions of the act of June 29, 1906 (34 Stat. L. 607), as to the treatment of animals in course of transportation, which were sustained in *U. S. v. N. Y. Cent. & H. R. R. Co.*, 156 Fed. 249 (C. C. N. Y., 1907). The former provisions of R. S., §§ 4386-4390, were sustained in *U. S. v. Boston & A. R. R. Co.*, 15 Fed. 209 (C. C. Mass., 1883). See also as to such provisions, *U. S. v. East Tennessee, Virginia & Georgia R. R. Co.*, 13 Fed. 642 (C. C. Tenn., 1882); *U. S. v. Louisville & N. R. R. Co.*, 18 Fed. 480 (D. C. Tenn., 1883); *Cotting v. Kansas City Stock-Yards Co.*, 82 Fed. 839, 843 (C. C. Kan., 1897); *Interstate Stock-Yards Co. v. Indianapolis U. Ry. Co.*, 99 Fed. 472 (C. C. Ind., 1900); *U. S. v. St. Louis & S. F. R. R. Co.*, 107 Fed. 870 (C. C. Mo., 1901); *Southern Pac. Co. v. Arnett*, 126 Fed. 75, 61 C. C. A. 131 (8th C. 1903); *U. S. v. Louisville & N. R. Co.*, 156 Fed. 863 (D. C. Ky., 1907); *Cincinnati, N. O. & T. P. Ry. Co. v. Greening*, 100 S. W. 825 (Ct. App. Ky., 1907); *Brockway v. American Express Co.*, 168 Mass. 257, 47 N. E. 87 (1897); *Ecton v. Chicago, B. & Q. Ry. Co.*, 102 S. W. 575 (Ct. App. Mo., 1907); *Chicago, B. & Q. Ry. Co. v. Slattery*, 107 N. W. 1045 (Supm. Ct. Neb., 1906); *Texas & Pacific Ry. Co. v. Berchfield*, 19 Tex. Civ. App. 228, 46 S. W. 900 (1898); *St. Louis S. W. Ry. Co. v. Dolan*, 77 S. W. 415 (Tex. Civ. App., 1903); *Reynolds v. Great Northern Ry. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883 (1905); *Burns v. Chicago, Milwaukee & St. Paul Ry. Co.*, 104 Wis. 646, 80 N. W. 927 (1899). As to effect upon State legislation upon same subject, see *Gulf, Colorado & Santa Fe Ry. Co. v. Gray*, 87 Tex. 312, 28 S. W. 280 (1894).

As to application to receivers, see *U. S. v. Harris*, 177 U. S. 305, 20 Supm. 609, 44 L. ed. 780 (1900). See as to transportation of

animals to foreign countries, act of March 3, 1891 (26 Stat. L. 833).

R. S., tit. 52, §§ 4463-4500, contain numerous provisions by way of regulation of the conduct of those engaged in transportation within the scope of the commerce clause. As to section 4465 limiting number of passengers on steamer, see *The Hazel Kirke*, 25 Fed. 601 (C. C. N. Y., 1885); section 4470 providing for precautions against fire and section 4491 as to instruments, etc., for security of life, *Cheboygan Lumber Co. v. Delta Transp. Co.*, 100 Mich. 16, 58 N. W. 630 (1894); *Burrows v. Delta Transp. Co.*, 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468 (1895). As to transportation of explosives, see sections 5353-5355, in addition to sections 4278-4280, 4288. As to provision of act of July 7, 1838, as to evidence of negligence in actions against proprietors of steamboats, see *Bradley v. Northern Transp. Co.*, 15 Ohio St. 553 (1864); *Poree v. Cannon*, 14 La. Ann. 501 (1859). By act of August 2, 1882 (22 Stat. L. 186), is regulated "the carriage of passengers by sea." See as amended by act of February 9, 1905 (33 Stat. L. 711). By act of March 3, 1901 (31 Stat. L. 1446), provision is made for reports of accidents to be made by carriers to the Interstate Commerce Commission. As to whether Congress may regulate rights in public conveyances, see *Civil Rights Cases*, 109 U. S. 3, 19, 60, 3 Supm. 18, 27, 56, 27 L. ed. 835 (1883).

Of far-reaching importance are the requirements of the act of March 2, 1893 (27 Stat. L. 531), for the use of safety appliances on railroads. Its validity was sustained in *U. S. v. Atlantic Coast Line R. R. Co.*, 153 Fed. 918 (D. C. N. C., 1907). See as amended by act of March 2, 1903 (32 Stat. L. 943), as to which see *U. S. v. Chicago, M. & St. P. Ry. Co.*, 149 Fed. 486 (D. C. Iowa, 1906). Of course it has no application to engines or cars not used in commerce within the scope of the commerce clause. *Rosney v. Erie R. R. Co.*, 135 Fed. 311, 68 C. C. A. 155 (2d C. 1905). But in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 22, 25 Supm. 158, 163, 49 L. ed. 872 (1904), reversing 117 Fed. 462, 54 C. C. A. 508 (8th C. 1902), it was held applicable to a dining car regularly used in interstate traffic, but temporarily left empty on a side track, while waiting for the train to be made up for the next trip. See also *Schlemmer v. Buffalo, Rochester, etc., Ry. Co.*, 205 U. S. 1, 27 Supm. 407, 51 L. ed. 681 (1907); *U. S. v. Pittsburgh, C., C. & St. L. Ry. Co.*, 143 Fed. 360 (D. C. Ohio, 1905); *U. S. v. Northern Pac. Terminal Co.*, 144 Fed. 861 (D. C. Oreg., 1906); *U. S. v. Great Northern Ry. Co.*, 145 Fed. 438 (D. C. Wash., 1906); *U. S. v. Atlantic Coast Line R. R. Co.*, *supra*. In

The most conspicuous instance of exercise of power in this respect is the Interstate Commerce Act,²⁹ the principal objects of which are "to secure just and reasonable charges for transportation; to prohibit unjust

Malott v. Hood, 201 Ill. 202, 66 N. E. 247 (1903), section 4 was held applicable to empty as well as loaded cars. In *Mobile, Jackson & Kansas City R. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395 (Nov. T. 1904), liability under the act was held to include injury, resulting in death, occurring in the course of making up a train for use in interstate commerce. Here was followed *Voelker v. Chicago, M. & St. P. Ry. Co.*, 116 Fed. 867 (C. C. Iowa, 1902), which was however reversed in *Chicago, M. & St. P. Ry. Co. v. Voelker*, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264 (8th C. 1904). That knowledge is not element of offense under act, see *U. S. v. Chicago, B. & Q. Ry. Co.*, 156 Fed. 180 (D. C. Neb., 1907). That the act "is a criminal law, and all violations of its provisions are, in the broad sense, crimes or misdemeanors," see *U. S. v. Illinois Cent. R. R. Co.*, 156 Fed. 182 (D. C. Ky., 1907). See also as to such act, *U. S. v. Geddes*, 134 Fed. 452, 65 C. C. A. 320 (6th C. 1904); *U. S. v. Southern Ry. Co.*, 135 Fed. 122 (C. C. Ill., 1905); *U. S. v. Chicago, P. & St. L. Ry. Co.*, 143 Fed. 353 (D. C. Ill., 1906); *U. S. v. Great Northern Ry. Co.*, 150 Fed. 229 (D. C. Wash., 1906); *U. S. v. Atchison, T. & S. F. Ry. Co.*, 150 Fed. 442 (D. C. Colo., 1907); *U. S. v. St. Louis, I. M. & S. R. R. Co.*, 154 Fed. 516 (D. C. Tenn., 1907); *U. S. v. Southern Pac. Co.*, 154 Fed. 897 (D. C., Oreg., 1907); *U. S. v. Louisville & N. R. R. Co.*, 156 Fed. 193 (D. C. Ky., 1907); *U. S. v. Louisville & N. R. R. Co.*, 156 Fed. 195 (D. C. Ky., 1907); *Southern Ry. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459 (1906); *Philadelphia & Reading Ry. Co. v. Winkler*, 4 Pen. (Del.) 387, 56 Atl. 112 (1903); *St. Louis, I., M. & S. Ry. Co. v. Neal*, 98 S. W. 958 (Supm. Ct. Ark., 1906). As to provision of section 7 for extension of time by Interstate Commerce Commission, see *Nichols v. Chicago & West Michigan Ry. Co.*, 125 Mich. 394, 84 N. W. 470 (1900); of section 8 as to assumption of risk by employee, *Mobile, Jackson & Kansas City R. R. Co. v. Bromberg*, *supra*.

²⁹ Act of February 4, 1887 (24 Stat. L. 379); see as amended by act of June 29, 1906 (34 Stat. L. 584). See also "Elkins Act" of February 19, 1903 (32 Stat. L. 847), as to validity of which, see *Armour Packing Co. v. U. S.*, 153 Fed. 1, 8, 82 C. C. A. 135, 142 (8th C. 1907).

discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights.”³⁰ The act is established to be valid as within the scope of the commerce clause.³¹ It seems to by no means exhaust the power of Congress in this respect, the extent of which power has not as yet been very clearly defined. But, as elsewhere stated, with reference to the power of a State to regulate such conduct and liability, the solution of the problem seems to us to lie principally at least in a consideration of the question *for whose benefit such conduct or liability is regulated*. In this view such regulation is not within the scope of the commerce clause, unless operating *for the benefit of those enjoying the benefit of transportation* within the scope of the commerce clause. For instance, in case of a corporation, there are many matters of internal management, thus the amount and character of capital stock and indebtedness, as to which it seems doubtful whether any regulation thereof would be for the benefit of those enjoying the benefit of transportation by such corporation. Much at least

³⁰ *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 12 Supm. 844, 36 L. ed. 699 (1892), affirming 43 Fed. 37 (C. C. Ohio, 1890), which see as to causes inducing the enactment of the act; also *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 210, 16 Supm. 666, 672, 40 L. ed. 940 (1896); *Van Patten v. Chicago, M. & St. P. Ry. Co.*, 81 Fed. 545 (C. C. Iowa, 1897).

³¹ *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 472, 14 Supm. 1125, 1131, 38 L. ed. 1047 (1894). Here too were sustained the provisions for inquiry into the management of the business of carriers, and for investigation of the subject of commerce as conducted by them.

of such regulation would seem to be merely for the benefit of the "public," and, though within the power of the States, beyond the scope of the commerce clause.

§ 39. The same; relations between carrier and employees.

It seems reasonably clear that, under certain conditions, the relations between a carrier and its employees are within the scope of the commerce clause, but to what extent seems as yet not clearly defined.³² In accordance with what has just been seen, the regulation of such relations seems not within its scope, unless operating *for the benefit of those enjoying the benefit of transportation within the scope of the com-*

³² The act of March 2, 1893 (27 Stat. L. 531) providing for the use of safety appliances on railroads (see § 38) contains provisions for the benefit of employees, as to which see *Brooks v. Southern Pac. Co.*, 148 Fed. 986 (C. C. Ky., 1906); *Howard v. Illinois Cent. R. R. Co.*, 148 Fed. 997 (C. C. Tenn., 1907).

By act of June 1, 1898 (30 Stat. L. 424) provision is made for arbitration of controversies between employers and employees; section 10 was held unconstitutional as applied to discrimination against union labor in *Adair v. U. S.* (Supm. Ct. U. S., 1908), reversing *U. S. v. Adair*, 152 Fed. 737 (D. C. Ky., 1907); *U. S. v. Scott*, 148 Fed. 431 (D. C. Ky., 1906); *Order of R. R. Telegraphers v. Louisville & N. R. R. Co.*, 148 Fed. 437 (C. C. Ky., 1906). See also as to such act, *Re Southern Pac. Co.*, 155 Fed. 1001 (C. C. Cal., 1907).

There are numerous provisions as to seamen. In *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Supm. 821, 47 L. ed. 1002 (1903), reversing *The Eudora*, 110 Fed. 430 (D. C. Pa., 1901), was sustained the act of December 21, 1898 (30 Stat. L. 756), regulating the payment of seamen's wages. To the same effect, *Kenney v. Blake*, 125 Fed. 672, 60 C. C. A. 362 (9th C. 1903), affirming *The Troop*, 117 Fed. 557 (D. C. Wash., 1902). See *The Kestor*, 110 Fed. 432 (D. C. Del., 1901). As to act of July 20, 1790, for apprehension of deserting seamen, see *Ex parte Pool*, 2 Va. Cas. 276 (1821). As to employment of aliens on steam vessels, see act of April 17, 1874 (18 Stat. L. 30). For provisions as to licensing and other provisions as to officers of vessels, see R. S., §§ 4131, 4138-4152, 4250. As to agreements for fishing voyage, see R. S., §§ 4391-4394.

merce clause. By this test a mere regulation of, for instance, the liability of a carrier to its employees for negligence seems not within such scope.³³ In this respect the relation of the employees to the carrier seems to be that of a portion of the "public," rather than of persons enjoying the benefit of transportation within the scope of the commerce clause. In this view regulation of such liability, though doubtless within the power of the State, is beyond the power conferred by the commerce clause. It would doubtless be otherwise however should it appear that regulation of such liability does operate for the benefit of those enjoying the benefit of transportation within the scope of the commerce clause, that is, passengers or shippers, but this seems, to say the least, not clear.

§ 40. Punishment of crimes.

It is doubtless within the power of Congress to provide for the punishment of crimes against the person

³³ By the act of June 11, 1906 (34 Stat. L. 232) is imposed a liability upon carriers engaged in such commerce to employees. In *Howard v. Illinois Central R. R. Co.* (Supm. Ct. U. S., 1908), affirming 148 Fed. 986 (C. C. Ky., 1906), also affirming *Brooks v. Southern Pac. Co.*, 148 Fed. 997 (C. C. Tenn., 1907), this act was held invalid on the ground that "as to traffic or other matters within the State, the act is unconstitutional, and it cannot be separated from that part which is claimed to be valid as relating to interstate commerce." This leaves undetermined the general question of the power to regulate the liability of a carrier to its employees. The act had been sustained in *Spain v. St. Louis & S. F. R. R. Co.*, 151 Fed. 522 (C. C. Ark., 1907); *Sneed v. Central of Georgia Ry. Co.*, 151 Fed. 608 (C. C. Ga., 1907); *Kelley v. Great Northern Ry. Co.*, 152 Fed. 211 (C. C. Minn., 1907); *Plummer v. Northern Pac. Ry. Co.*, 152 Fed. 206 (C. C. Wash., 1907); *Lancer v. Anchor Line*, 155 Fed. 433 (D. C. N. Y., 1907).

It was regarded unnecessary to decide the point in *Hall v. Chicago, R. I. & P. Ry. Co.*, 149 Fed. 564 (C. C. Iowa, 1906).

See article in 5 Mich. Law Rev. 418 (1907), by S. S. Gregory; in *Id.* 639 (1907), by C. V. Wisner.

or property of those engaged in transportation within the scope of the commerce clause; so as to crimes against the persons or property transported.³⁴

§ 41. Regulation of rates of transportation.

Doubtless, as it is beyond the power of the States,³⁵ so it is within that of Congress, to regulate the rates of transportation within the scope of the commerce clause.³⁶

§ 42. Exercise of power, as determined by agencies by which commerce is carried on, whether by individuals or by corporations.

The grant of such power "is general in its terms, making no reference to the agencies by which commerce may be carried on. It includes commerce by

As to distinction between such act and requirements for use of safety appliances (see § 38), see *Brooks v. Southern Pacific Co.*, *supra*; *Howard v. Illinois Central R. R. Co.*, *supra*.

By act of March 4, 1907 (34 Stat. L. 1415), are limited the hours of service of railroad employees.

³⁴ See, for instance, as to robbery, R. S., § 5370; train robbery, etc., act of July 1, 1902 (32 Stat. L. 727). See, generally, *Charge to Grand Jury*, 2 Spr. 279, 30 Fed. Cas. No. 18,256 (1861). As to crimes committed on vessels, see *Ex parte Byers*, 32 Fed. 404 (C. C. Mich., 1887). As to act of March 3, 1825, for punishment of conspiracy to destroy vessel with intent to injure underwriter, etc., see *U. S. v. Cole*, 5 McLean, 513, 25 Fed. Cas. No. 14,832 (1853). As to liability for boarding vessel, see *U. S. v. Anderson*, 10 Blatchf. 226, 24 Fed. Cas. No. 14,447 (1872). In *U. S. v. Coombs*, 12 Pet. 72, 9 L. ed. 1004 (Jan. T. 1838), was sustained an act making it a crime to steal goods belonging to a vessel in distress or cast away upon a shoal of the sea. So held in case of goods taken above high-water mark upon the beach. As to liability under "Elkins Act" of February 19, 1903 (32 Stat. L. 847), see *U. S. v. Standard Oil Co.*, 155 Fed. 305 (D. C. Ill., 1907).

³⁵ See § 67.

³⁶ *Atlantic & P. R. R. Co. v. U. S.*, 76 Fed. 186, 192 (D. C. Cal., 1896; so held in case of a railroad corporation created by act of Congress). See *Interstate Commerce Commission v. Reich-*

whomsoever conducted, whether by individuals or by corporations.”³⁷ And in the exercise of such power restrictions may be imposed, not only upon the action of individuals, but upon the exercise of powers by corporations created under the authority of a State. “No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce.”³⁸ *A fortiori* may such restrictions be imposed upon the action of a mere voluntary association.³⁹

mann, 145 Fed. 235 (C. C. Ill., 1906). See Hendrick on “The Power to Regulate Corporations and Commerce” (1906), chap. 7; article in 5 *Columbia Law Rev.* 600 (1905); 6 *Id.* 497 (1906), by D. W. B.; in 39 *Am. Law Rev.* 517 (1905), by Blackburn Esterline; in 18 *Harv. Law Rev.* 572 (1905); by Victor Morawetz; in 19 *Id.* 486 (1906), by A. L. Moot; in 20 *Id.* 127 (1906), by F. W. Hackett.

In *Northern Securities Co. v. U. S.*, 193 U. S. 197, 343, 24 Supm. 436, 459, 48 L. ed. 679 (1906), it was regarded as unnecessary to express an opinion on the point.

³⁷ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204, 5 Supm. 826, 828, 29 L. ed. 158 (1885); *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357 (Dec. 1868).

³⁸ *Northern Securities Co. v. U. S.*, 193 U. S. 197, 345, 24 Supm. 436, 460, 48 L. ed. 679 (1904), affirming *U. S. v. Northern Securities Co.*, 120 Fed. 721 (C. C. Minn., 1903), where was sustained the application of the Federal anti-trust act in preventing a corporation from carrying out the purposes of a combination in violation thereof. As to application of Interstate Commerce Act, see *Interstate Commerce Commission v. Detroit, Grand Haven, etc., Ry. Co.*, 167 U. S. 633, 642, 17 Supm. 986, 989, 42 L. ed. 306 (1897).

³⁹ See *Re Debs*, 158 U. S. 564, 581, 15 Supm. 900, 905, 39 L. ed. 1092 (1895).

§ 43. Admiralty and maritime jurisdiction.

Although the power of Congress under the commerce clause, as applied to navigation, largely includes the same matters as to which admiralty and maritime jurisdiction is exercised, the latter is derived, not from the commerce clause, but from the entirely distinct provision by which the judicial power "shall extend to all cases of admiralty and maritime jurisdiction."⁴⁰ There seems reason for thinking that many at least of the cases having reference to vessels and navigable waters have been improperly referred to the commerce clause, rather than to the grant of admiralty and maritime jurisdiction, and it is asserted with much plausibility that "the control of Congress over ships, vessels, and the navigation of public waters has finally been placed by the Supreme Court of the United States on the solid foundation of the maritime and admiralty

⁴⁰ *The Genesee Chief*, 12 How. 443, 13 L. ed. 1058 (Dec. T. 1851). Here an act of Congress extending the jurisdiction of Federal courts to certain cases upon the lakes and navigable waters connecting the same, was sustained under the grant of admiralty and maritime jurisdiction, instead of under the commerce clause. See also *Fretz v. Bull*, 12 How. 466, 13 L. ed. 1068 (Dec. T. 1851); *The Propeller Commerce*, 1 Black, 574, 17 L. ed. 107 (Dec. T. 1861); *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451 (Dec. 1866); *The Belfast*, 7 Wall. 624, 640, 19 L. ed. 266 (Dec. 1868); *The Cheeseman v. Two Ferryboats*, 2 Bond, 363, 5 Fed. Cas. No. 2,633 (1870). Compare *Allen v. Newberry*, 21 How. 244, 16 L. ed. 110 (Dec. T. 1858). See *The Thomas Jefferson*, 10 Wheat. 428, 6 L. ed. 358 (1825).

In *The City of Salem*, 37 Fed. 846, 2 L. R. A. 380 (D. C. Oreg., 1889), there were held not to be referable to the admiralty jurisdiction the provisions of R. S., § 4465, as to the number of passengers to be carried by a steam vessel. To the contrary seems *U. S. v. Burlington & Henderson County Ferry Co.*, 21 Fed. 331 (D. C. Iowa, 1884). As to when navigable waters wholly within a State are within the admiralty jurisdiction of the Federal courts, see *Ex parte Boyer*, 109 U. S. 629, 3 Supm. 434, 27 L. ed. 1056 (1884); *The Robert W. Parsons*, 191 U. S. 17, 24 Supm. 8, 48 L. ed. 17 (1903).

jurisdiction.”⁴¹ Although in many instances it is perhaps not of practical importance whether the power of Congress is to be referred to the commerce clause, or to the grant of admiralty and maritime jurisdiction, there is a class of cases as to which its power can be sustained by referring it to such grant instead of to the commerce clause, for it seems established that there are waters within the admiralty jurisdiction that are not “navigable” so as to be within the scope of the commerce clause.⁴²

§ 44. Limitation of liability of owner of vessel.

Provision has been made by way of limitation of the liability of the owner of a vessel under various conditions.⁴³ Although such provisions have been referred to the commerce clause,⁴⁴ it now seems reason-

⁴¹ *People ex rel. Pennsylvania R. R. Co. v. Knight*, 171 N. Y. 354, 364, 64 N. E. 152, 155, 98 Am. St. Rep. 610 (1902); affirmed in *State ex rel. Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21, 24 Supm. 202, 48 L. ed. 325 (1904). It may not be clear that the Supreme Court has as yet gone to that extent, but see as to limitation of vessel-owners' liability, § 44. See also § 26. See extended discussion in *U. S. v. Banister Realty Co.*, 155 Fed. 583 (C. C. N. Y., 1907), where the legislation in restriction of construction of bridges, etc., in navigable waters (see § 48) was held referable to both the commerce clause and the grant of admiralty and maritime jurisdiction.

⁴² *U. S. v. Banister Realty Co.*, *supra*.

⁴³ R. S., §§ 4281-4289 (including act of March 3, 1851). So by the “Harter Act” of February 13, 1893 (27 Stat. L. 445). In *King v. American Transp. Co.*, 1 Flip. 1, 14 Fed. Cas. No. 7,787 (1859), section 4283 was held inapplicable to injury done on land within the body of a State, thus destruction of a building by fire. See however *Re Goodrich Transp. Co.*, 26 Fed. 713 (D. C. Wis., 1886).

⁴⁴ Thus, in *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. ed. 224 (Oct. 1880); *Providence & N. Y. Steamship Co. v. Hill Manuf. Co.*, 109 U. S. 578, 589, 3 Supm. 379, 386, 27 L. ed. 1038 (1883). See also as to such legislation, *Norwich Co. v. Wright*, 13 Wall. 104, 20 L. ed. 585 (Dec. 1871); *The Scotland*, 105 U. S. 24, 26 L.

ably clear that they are rather to be referred to the provision conferring admiralty and maritime jurisdiction, it being said that it is unnecessary to invoke the power conferred by the commerce clause to sustain such legislation. "The act of Congress which limits the liability of shipowners was passed in amendment of the maritime law of the country. * * * It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but in maritime matters it extends to all matters and places to which the maritime law extends."⁴⁵ In this view such provisions are beyond the scope of this treatise.

§ 45. Regulation of vessels.

While it is established that Congress may "pre-
scribe the form and size of the vessels employed

ed. 1001 (Oct. 1881); *Re Vessel Owners' Towing Co.*, 26 Fed. 169 (D. C. Ill., 1886); *Re Myers Excursion & Navigation Co.*, 57 Fed. 240 (D. C. N. Y., 1893); *Houston Direct Navigation Co. v. Ins. Co. of North America*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17 (1895); *Hagan v. City of Richmond*, 104 Va. 723, 52 S. E. 385, 3 L. R. A. N. S. 1120 (1905).

⁴⁵ *Re Garnett*, 141 U. S. 1, 11 Supm. 840, 35 L. ed. 631 (1891). Here the act of June 19, 1886 (24 Stat. L. 81), extending such limitation of liability, not only to "all sea-going vessels," but to "all vessels used on lakes or rivers, or in inland navigation, including canal boats, barges and lighters," was sustained without reference to the commerce clause, and as "in amendment of the maritime law of the country." See also *The Katie*, 40 Fed. 480 (D. C. Ga., 1889), decided on the same state of facts. See also *Buller v. Boston Steamship Co.*, 130 U. S. 527, 9 Supm. 612, 32 L. ed. 1017 (1889); *The Hamilton*, 207 U. S. 398, 28 Supm. 133 (1907). In *The Garden City*, 26 Fed. 766 (D. C. N. Y., 1886), the act of 1851 was likewise sustained without reference to the commerce clause. But see to the contrary, *Re Vessel Owners' Towing Co.*, *supra*. As to effect of act of 1851, prior to act of 1886, see *Moore v. American Transp. Co.*, 24 How. 1, 16 L. ed. 674 (Dec. 1860), affirming *American Transp. Co. v. Moore*, 5 Mich. 368 (1858).

upon " navigable waters of the United States, or may " subject the vessels to inspection and license, in order to insure their proper construction and equipment,"⁴⁶ such power seems derived, not from the commerce clause,⁴⁷ but from the provision conferring admiralty and maritime jurisdiction.⁴⁸ Congress has also been held to have power to provide for recording of conveyances, etc., of a vessel of the United States.⁴⁹

§ 46. The same; vessels engaged in transportation between points in same State.

In accordance with what has already been seen, it seems a reasonable view that the power of Congress to regulate vessels is to be referred to the provision conferring admiralty and maritime jurisdiction, in-

⁴⁶ *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999 (Dec. 1870). There are numerous provisions of this character. Thus, see as to regulation of vessels in foreign commerce, R. S., §§ 4306-4310; in domestic commerce, §§ 4311-4390; inspection of steam vessels, §§ 4399-4462. As to effect of enrollment of vessel as giving it character of vessel of United States, see *Lawrence v. Hodges*, 92 N. C. 672, 53 Am. Rep. 436 (1885).

As to inspection, see *Hartranft v. Du Pont*, 118 U. S. 223, 6 Supm. 1188, 30 L. ed. 205 (1886). As to previous act of July 7, 1838, see *Caldwell v. St. Louis Perpetual Ins. Co.*, 1 La. Ann. 85 (1846); *U. S. v. The William Pope*, Newb. 256, 28 Fed. Cas. No. 16,703 (1852).

⁴⁷ It was however referred to the commerce clause in *The Daniel Ball*, *supra*, applying requirements of inspection and licenses. See also *Pollard v. Hagan*, 3 How. 212, 229, 11 L. ed. 565 (Jan. T. 1845); *Sinnot v. Davenport*, 22 How. 227, 16 L. ed. 243 (Dec. T. 1859), reversing *Commissioners of Pilotage v. Steamboats Cuba, etc.*, 28 Ala. 185 (1856); *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96 (Dec. 1865); *U. S. v. Jackson*, 26 Fed. Cas. No. 15,458 (D. C. N. Y., 1841). See generally as to legislation by Congress as to such vessels, *The Lewellen*, 4 Biss. 156, 15 Fed. Cas. No. 8,307 (1868); *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409, 26 Supm. 679, 50 L. ed. 1082 (1906).

⁴⁸ See § 43.

⁴⁹ The act of July 29, 1850, to that effect was sustained in *White's Bank v. Smith*, 7 Wall. 646, 19 L. ed. 211 (Dec. 1868).

stead of to the commerce clause.⁵⁰ In this view there seems to be no difficulty in extending the power of regulation even to vessels wholly engaged in navigation between points in the same State and over waters also wholly within the State. But this view seems not clearly established, and it has frequently been assumed, or decided, that such power of regulation is to be referred to the commerce clause. Yet even in this view of it the power seems to extend under certain conditions to vessels engaged in navigation under the conditions just stated. Although the decisions seem not entirely reconcilable, the propriety of regulation in any given case seems to depend on whether it is reasonably calculated to maintain the navigable waters in question "in a safe and desirable condition" for the use of the vessels actually engaged in transporta-

To the same effect, *Aldrich v. Aetna Co.*, 8 Wall. 491, 19 L. ed. 473 (Dec. 1869), reversing *Aetna Ins. Co. v. Aldrich*, 26 N. Y. 92 (1862); *Blanchard v. The Martha Washington*, 1 Cliff. 463, 3 Fed. Cas. No. 1,513 (1860), affirming *The Martha Washington*, 3 Ware, 245, 16 Fed. Cas. No. 9,148 (1860); *The Gordon Campbell*, 131 Fed. 963 (D. C. N. Y., 1904); *Foster v. Chamberlain*, 41 Ala. 158 (1867); *Mitchell v. Steelman*, 8 Cal. 363 (1857); *Cunningham v. Tucker*, 14 Fla. 251 (1873); *Wood v. Stockwell*, 55 Me. 76 (1867); *Perkins v. Emerson*, 59 Me. 319 (1871); *Robinson v. Rice*, 3 Mich. 235 (1854); *Haug v. Third Nat. Bank of Detroit*, 77 Mich. 474, 43 N. W. 939 (1889); *Fleming v. Fire Assoc. of Philadelphia*, 147 Mich. 404, 110 N. W. 933 (1907); *Shaw v. McCandless*, 36 Miss. 296 (1858); *Best v. Staple*, 61 N. Y. 71 (1874); *Lawrence v. Hodges*, 92 N. C. 672, 53 Am. Rep. 436 (1885). And State legislation to the same effect is superseded thereby. See decisions, *supra*.

See also *Arnold v. Eastin*, 116 Ky. 686, 76 S. W. 855 (1903); *Parker Mills v. Jacot*, 8 Bosw. (N. Y.) 161 (1861).

⁵⁰ See § 43. It was on this ground that in *U. S. v. Burlington & Henderson County Ferry Co.*, 21 Fed. 331 (D. C. Iowa, 1884), was sustained the application of R. S., §§ 4400, 4466, 4500, to a vessel engaged in navigation between points in the same State. See however to the contrary, *The City of Salem*, *infra*. Compare *U. S. v. Beacham*, 29 Fed. 284 (C. C. Md., 1886).

tion within the scope of the commerce clause.⁵¹ Obviously such might frequently be the case in a crowded highway of intrastate, as well as interstate and foreign commerce.

§ 47. Establishment and maintenance of means of transportation; creation and licensing of corporations.

Although the power of regulation has more commonly been exercised by way of merely regulating the action of independent agencies, there is no doubt that Congress may exercise such power by way of itself establishing and maintaining, at any rate, of authorizing the establishment and maintenance of means of commercial communication. Such exercise of the power is independent of the consent or concurrence of

⁵¹ In accordance with this distinction was sustained in *The City of Salem*, 37 Fed. 846, 2 L. R. A. 380; 38 Fed. 762, 4 L. R. A. 125 (D. C. Oreg., 1889), as applicable to a vessel navigating solely within a State, the prohibition of R. S., § 4465, against carrying more passengers than stated in the certificate of inspection provided for in section 4421. To the same effect, *The Hazel Kirke*, 25 Fed. 601 (C. C. N. Y., 1885). See also *U. S. v. Frank Sylvia*, 37 Fed. 155 (D. C. Cal., 1888).

The provisions of the act of July 7, 1838, for inspecting and licensing vessels were in *U. S. v. Jackson*, 26 Fed. Cas. No. 15,458 (D. C. N. Y., 1841), held applicable to a ferry-boat plying wholly within a State, on the East River in New York. In *The Sunswick*, 6 Ben. 112, 23 Fed. Cas. No. 13,624 (1872), a like result was reached, but by holding the ferry-boat engaged in interstate commerce within the rule in *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999 (Dec. 1870). See § 26a. Compare *The Thomas Swan*, *infra*. See *The Bright Star*, 1 Woolw. 266, 4 Fed. Cas. No. 1,880 (1868); *U. S. v. The William Pope*, Newb. 256, 28 Fed. Cas. No. 16,703 (D. C. Mo., 1852). As to effect of requirement of act of July 7, 1838, as to carrying lights, see *Fitch v. Livingston*, 4 Sandf. (N. Y.) 492 (1851). In *Oyster Police Steamers of Maryland*, 31 Fed. 763 (D. C. Md., 1887); affirmed in *Governor Robert McLane v. U. S.*, 35 Fed. 926 (C. C. Md., 1888), requirements of inspection were held applicable to vessels used solely to enforce laws of the State for the protection of oyster beds and fisheries. As to provisions of

any State.⁵² "This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed, and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as

act of August 30, 1852, for inspection, see *Houston & Galveston Nav. Co. v. Dwyer*, 29 Tex. 376 (1867).

But in *The Gretna Green*, 20 Fed. 901 (D. C. Ohio, 1883), the requirements of section 4492 as to a barge in tow of a steamer being provided with means of safety for passengers, were held inapplicable to a barge being towed merely between points in the same State, though by vessel subject to the laws of Congress. And for instances of requirement of inspection held inapplicable to vessels wholly engaged in transportation between points in same State, see *The Thomas Swan*, 6 Ben. 42, 23 Fed. Cas. No. 13,931 (1872); *The Oconto*, 5 Biss. 460, 18 Fed. Cas. No. 10,421 (1873; tug); *U. S. v. The Seneca*, 1 Biss. 371, 27 Fed. Cas. No. 16,251 (1861). So requirement of license under act of July 7, 1838, held inapplicable to ferry-boat thus engaged, in *U. S. v. The James Morrison*, Newb. 241, 26 Fed. Cas. No. 15,465 (1846).

⁵² *Stockton v. Baltimore & N. Y. R. R. Co.*, 32 Fed. 9 (C. C. N. J., 1887).

well as Federal corporations.”⁵³ This power may be exercised by means either of the creation of corporations, or the conferring of power upon corporations created by other authority, thus by the States.⁵⁴ It has notably been exercised in authorizing the construction and maintenance of railroads;⁵⁵ so as to telegraph⁵⁶

⁵³ *California v. Central Pacific R. R. Co.*, 127 U. S. 1, 8 Supm. 1073, 32 L. ed. 150 (1888). Thus, in *Wilson v. Shaw*, 204 U. S. 24, 27 Supm. 233, 51 L. ed. 351 (1907), was sustained the power to provide for the construction of the Panama canal.

⁵⁴ As to whether such a corporation may be authorized by Congress to exercise the power of eminent domain, see § 66. See generally as to creation and licensing of corporations by Congress, Hendrick on “The Power to Regulate Corporations and Commerce” (1906); Prentice on “The Federal Power over Carriers and Corporations” (1907); Judson on “Interstate Commerce,” §§ 59-62 (1905); article in 34 Am. Law Rev. 186 (1900), by E. W. Huffcut; 37 Id. 237 (1903), by W. S. Logan; Id. 703 (1903), by J. B. Sanborn; in 5 Columbia Law Rev. 415 (1905), by H. W. Chaplin; in 2 Mich. Law Rev. 358, 501 (1904); 3 Id. 264 (1905), by H. L. Wilgus; in 11 Yale Law Jour. 273 (1902), by J. B. Dill; 14 Id. 301 (1905), by Thomas Thacher. For suggestion that even a banking corporation might be created under the authority of the commerce clause, see Prentice & Egan’s Commerce Clause, p. 315.

⁵⁵ For an instance of a corporation created by Congress for that purpose, see *Roberts v. Northern Pacific R. R. Co.*, 158 U. S. 1, 21, 15 Supm. 756, 762, 39 L. ed. 873 (1895); of power conferred for such purpose upon a corporation created under authority of a State, *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 657, 10 Supm. 965, 971, 34 L. ed. 295 (1890). As to exemption from taxation, see *California v. Central Pacific R. R. Co.*, *supra*. As to act of June 15, 1866, providing for connection of roads so as to form continuous lines, see *Richmond v. Dubuque & Sioux City R. R. Co.*, 33 Iowa, 422, 499 (1872).

⁵⁶ In *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. ed. 708 (Oct. 1877), legislation under which, as against State legislation, was sustained the power of a foreign corporation to erect a telegraph line within a State was regarded as based, not merely upon the commerce clause, but upon the provision empowering Congress “to establish post-offices and post-roads.” To like effect, see *Union Trust Co. v. Atchison, Topeka & Santa Fe*

or telephone⁵⁷ lines. In some instances at least, however, its exercise may be also referable to distinct grants of power, thus "to provide for postal accommodations and military exigencies."⁵⁸ There has recently been much discussed the question whether it is within the power of Congress to require a license as the condition of a corporation created under the authority of a State, engaging in transportation within the scope of the commerce clause.⁵⁹ It seems a reasonable view that Congress has such power, so far as the commerce clause, considered by itself, is concerned; but there remains the question whether such action by Congress would not be in contravention of the Fifth Amendment.⁶⁰ It seems to scarcely need pointing out that it is beyond the power of Congress to require such a license as the condition of a corporation created

R. R. Co., 8 N. M. 327, 43 Pac. 701 (1895). See under same Congressional legislation, *Western Union Tel. Co. v. Atlantic & Pacific States Tel. Co.*, 5 Nev. 102 (1869); *Western Union Tel. Co. v. Mayor of N. Y.*, 38 Fed. 552 (C. C. N. Y., 1889); *Southern Bell Telephone, etc., Co. v. City of Richmond*, 78 Fed. 858 (C. C. Va., 1897); *Michigan Tel. Co. v. City of Charlotte*, 93 Fed. 11 (C. C. Mich., 1899); *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90 (Dec. T. 1880); *Western Union Tel. Co. v. City of Visalia*, 149 Cal. 744, 87 Pac. 1023 (1906); *Chicago & Atchison Bridge Co. v. Pacific Mutual Tel. Co.*, 36 Kan. 113, 12 Pac. 535 (1887); *State v. Western Union Tel. Co.*, 90 Pac. 299 (Supm. Ct. Kan., 1907); *Postal Tel. Cable Co. v. City of Newport*, 76 S. W. 159 (Ct. App. Ky., 1903); *Postal Tel. Cable Co. v. Morgans' Louisiana, etc., R. R. Co.*, 49 La. Ann. 58, 21 So. 183 (1897).

⁵⁷ In *Muskogee Nat. Tel. Co. v. Hall*, 118 Fed. 382, 55 C. C. A. 208 (8th C. 1902), reversing 4 Ind. T. 18, 64 S. W. 600 (1901), was applied *Pensacola Tel. Co. v. Western Union Tel. Co.*, in sustaining power to provide for grant of right of way through Indian Territory for construction of telephone line.

⁵⁸ See note 56, *supra*.

⁵⁹ See note 54, *supra*.

⁶⁰ See § 32.

under the authority of a State engaging in transactions other than transportation within the scope of the commerce clause, thus, transportation,⁶¹ sale, or manufacture,⁶² wholly within the limits of a State.

§ 48. Removing or prohibiting obstructions to navigation.

The power of Congress "to prevent any and all obstructions" to navigation is said to be one that "cannot be questioned." When it "chooses to act, it is not concluded by anything that the States, or that individuals by their authority or acquiescence, have done, from assuming entire control of the matter, and abating any obstructions that may have been made and preventing any others from being made except in conformity with such regulations as it may impose. The ultimate power of Congress over the whole subject is undoubted."⁶³ For such purpose Congress is said to possess "all the powers which existed in the States before the adoption of the National Constitution, and

⁶¹ See § 23.

⁶² See § 25.

⁶³ *U. S. v. Bellingham Bay Boom Co.*, 176 U. S. 211, 215, 20 Supm. 343, 345, 44 L. ed. 437 (1900). See also *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. ed. 412 (Jan. T. 1829); *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96 (Dec. 1865); *Union Bridge Co. v. U. S.*, 204 U. S. 364, 385, 27 Supm. 367, 374, 51 L. ed. 523 (1907). That such power may be referable to the grant of admiralty and maritime jurisdiction, see § 43. As to injunction in aid of such legislation, see *North Bloomfield Gravel Mining Co. v. U. S.*, 88 Fed. 664, 32 C. C. A. 84 (9th C. 1898), affirming *U. S. v. North Bloomfield Gravel Min. Co.*, 81 Fed. 243 (C. C. Cal., 1897). Here was sustained and applied legislation regulating the conduct of hydraulic mining. See also *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 Fed. 753 (C. C. Cal., 1884); article in 7 Yale Law Jour. 385 (1898), by Samuel Knight. As to power to prescribe conditions of use of bridge (the International Bridge across the Niagara river), see *Canada Southern Ry. Co. v. International Bridge Co.*, 8 Fed. 190 (D. C. N. Y., 1881). As to act of June 29, 1888 (25 Stat. L. 209), amended by act of

which have always existed in the Parliament in England.”⁶⁴ This power, long comparatively dormant, has recently been extensively exercised, it being now unlawful “to construct or commence the construction of⁶⁵ any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War.” But such structures “may be built under authority of the legislature of a State across rivers and other waterways, the navigable portions of which lie wholly within the limits of a single State, provided the locations and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced.”⁶⁶

August 18, 1894 (28 Stat. L. 360), to prevent deposits within tidal waters of New York harbor and adjacent or tributary waters by dumping or otherwise, see *U. S. v. Romard*, 89 Fed. 156 (C. C. N. Y., 1898).

⁶⁴ *Gilman v. Philadelphia*, *supra*; *South Carolina v. Georgia*, *supra*. As to power to prevent pollution, see article in 38 Am. Law Rev. 321 (1904), by C. C. Allen.

⁶⁵ Such provision was held not to apply to the *rebuilding* of a bridge lawfully in existence when such legislation was enacted, in *Rogers Sand Co. v. Pittsburgh, Ft. W. & C. Ry. Co.*, 139 Fed. 7, 71 C. C. A. 419 (3d C. 1905). And so of *repairing*, in *Kansas City, Memphis & Birmingham R. R. Co. v. Wiggul*, 82 Miss. 223, 33 So. 965, 61 L. R. A. 578 (1903). So of renewal of superstructure, in *U. S. v. Parkersburg Branch R. R. Co.*, 143 Fed. 224, 74 C. C. A. 354 (4th C. 1906).

⁶⁶ Act of March 3, 1899, § 9 (30 Stat. L. 1151), the River and Harbor Appropriation Act. See *Stone v. Southern Illinois & Missouri Bridge Co.*, 206 U. S. 267, 27 Supm. 615, 51 L. ed. 1057 (1907); *Viebahn v. Board of County Commrs. of Crow Wing County*, 96 Minn. 276, 104 N. W. 1089, 3 L. R. A. N. S. 1126 (1905). As to validity of contract for construction of bridge with-

out compliance with such provision, see *People v. Board of Supervisors*, 122 Ill. App. 40 (1905). See also as to necessity of compliance therewith, *Minnesota Canal & Power Co. v. Pratt*, 112 N. W. 395 (Supm. Ct. Minn., 1907). This and other provisions of the act superseded sections 4, 5 of the act of September 19, 1890 (26 Stat. L. 453), which amended sections 9, 10 respectively of the act of August 11, 1888 (25 Stat. L. 424), by which the Secretary of War was authorized to require alteration of a bridge.

In *Union Bridge Co. v. U. S.*, 204 U. S. 364, 27 Supm. 367, 51 L. ed. 523 (1907), affirming *U. S. v. Union Bridge Co.*, 143 Fed. 377 (D. C. Pa., 1906), section 18 of the act of March 3, 1899 (30 Stat. L. 1153) was held, with reference to a bridge, not open to objection as delegating legislative and judicial powers to the Secretary of War. There had been a conflict of authority on this point. In accord with the above decision see *U. S. v. City of Moline*, 82 Fed. 592 (D. C. Ill., 1897); *E. A. Chatfield Co. v. City of New Haven*, 110 Fed. 788 (C. C. Conn., 1901). To the contrary see *U. S. v. Keokuk & H. Bridge Co.*, 45 Fed. 178 (D. C. Iowa, 1891); *U. S. v. Rider*, 50 Fed. 406 (D. C. Ohio, 1892). See subsequent decision in *Rider v. U. S.*, 178 U. S. 251, 20 Supm. 838, 44 L. ed. 1057 (1900), where the point was left undecided, as it was in *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 165 U. S. 365, 17 Supm. 357, 41 L. ed. 747 (1897). See *Lane v. Smith*, 71 Conn. 65, 41 Atl. 18 (1898). See also *U. S. v. Milwaukee & St. P. Ry. Co.*, 5 Biss. 410, 420, 26 Fed. Cas. Nos. 15,778, 15,779 (1873). And compare *U. S. v. Romard*, 89 Fed. 156 (C. C. N. Y., 1898).

As to sections 4, 5 of act of September 19, 1890 (26 Stat. L. 453), see *Rider v. U. S.*, *supra*; *Oregon City Transp. Co. v. Columbus St. Bridge Co.*, 53 Fed. 549 (D. C. Oreg., 1892); *Adams v. Ulmer*, 91 Me. 47, 39 Atl. 347 (1897); as to section 7, *Grand Trunk Ry. Co. v. Backus*, 46 Fed. 211 (C. C. Mich., 1891); *City of Chicago v. Law*, 144 Ill. 569, 33 N. E. 855 (1893); *Navigable Waters*, 22 Op. Atty.-Gen. 332 (1899); as to sections 6, 7, 10, 11, *U. S. v. Burns*, 54 Fed. 351 (C. C. W. Va., 1893); as to section 10, *Northern Pac. Ry. Co. v. U. S.*, 104 Fed. 691, 44 C. C. A. 135, 59 L. R. A. 80 (8th C. 1900). As to application of section 10 to non-navigable portion of navigable stream, *U. S. v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 19 Supm. 770, 43 L. ed. 1136 (1899), reversing 9 N. M. 292, 51 Pac. 674 (1898). See generally as to act of September 19, 1890, *Yesler v. Washington Harbor Line Commrs.*, 146 U. S. 646, 13 Supm. 190, 36 L. ed. 1119 (1892),

Furthermore "the creation of any obstruction⁶⁷ not affirmatively authorized by Congress,⁶⁸ to the navigable capacity of any of the waters of the United States" is prohibited, also the building of structures in navigable waters "outside established harbor lines, or where no harbor lines have been established except on plans recommended by the Chief of Engineers and authorized by the Secretary of War."⁶⁹ So as to dismissing writ of error to *Harbor Line Commrs. v. State*, 2 Wash. 530; s. c. as *State ex rel. Yesler v. Prosser*, 27 Pac. 550 (1891).

See also sections 13, 16 of act of March 3, 1899 (30 Stat. L. 1152, 1153), as to deposit of material in navigable waters, as to which see *New England Dredging Co. v. U. S.* (*Scow No. 36*), 144 Fed. 932, 75 C. C. A. 572 (1st C. 1906); *The Minot L. Wilcox* (*Scow No. 9*), 152 Fed. 548 (D. C. Mass., 1907). See also provisions as to use, etc., of works built by the United States; also other provisions as to obstruction of navigation and for removal of sunken vessels. As to section 15 see *The Caldy*, 153 Fed. 836 (C. C. A. 4th C. 1907); *The Waverley*, 155 Fed. 436 (D. C. N. Y., 1907); *The Anna M. Fahy*, 153 Fed. 866 (C. C. A. 2d C. 1907). See also as to deposit of material, act of March 3, 1905 (33 Stat. L. 1147); floating loose timbers and logs, act of May 9, 1900 (31 Stat. L. 172).

As to effect of approval by Secretary of location of bridge, with reference to it constituting unlawful obstruction, see *Pedrick v. Railroad*, 143 N. C. 485, 511, 55 S. E. 877, 886, 10 L. R. A. N. S. 554, 564 (1906).

⁶⁷ Such provision was held not to apply to the rebuilding of a bridge lawfully in existence when such legislation was enacted. *Rogers Sand Co. v. Pittsburgh, Ft. W. & C. Ry. Co.*, *supra*. See note 65, *supra*.

⁶⁸ In *Maine Water Co. v. Knickerbocker Steam Towage Co.*, 99 Me. 473, 59 Atl. 953 (1905), the prohibition was held not to apply to a structure not expressly authorized by Congress, but by the Secretary in accordance with section 10.

⁶⁹ Act of March 3, 1899, § 10 (30 Stat. L. 1151). See *Viebahn v. Board of County Commrs. of Crow Wing County*, 96 Minn. 276, 104 N. W. 1089, 3 L. R. A. N. S. 1126 (1905). The like prohibition of section 10 of the act of September 19, 1890 (26 Stat. L. 454), (containing however the words "authorized by law" instead

cavating or filling, or making of certain alterations or modifications specified.⁷⁰ So authority is conferred upon the Secretary of War to require alteration of a bridge that is an obstruction to navigation.⁷¹

§ 49. Authorizing placing of obstructions to navigation.

Congress also has power under certain conditions to authorize placing of obstructions to navigation.⁷² Obviously, especially if temporary, they are frequently necessarily placed in the course of effectuating improvements in navigation. But so far as the commerce clause is concerned, it seems a reasonable view that Congress has no power to authorize the placing of such an obstruction for any purpose "wholly foreign to

of "authorized by Congress"), was applied to a boom across a river in *U. S. v. Bellingham Bay Boom Co.*, 176 U. S. 211, 20 Supm. 343, 44 L. ed. 437 (1900). To like effect under same statute, *U. S. v. Wishkah Boom Co.*, 136 Fed. 42, 68 C. C. A. 592 (9th C. 1905). See as to effect of act of March 3, 1899). By section 11 of act of March 3, 1899 (30 Stat. L. 1151), provision is made for the establishment of harbor lines by the Secretary of War. See *Viebahn v. Board of County Commrs. of Crow Wing County*, *supra*. As to sections 10, 11, with reference to construction of wharf by riparian owner, see *Cobb v. Commissioners of Lincoln Park*, 202 Ill. 427, 67 N. E. 5, 63 L. R. A. 264, 95 Am. St. Rep. 258 (1903).

⁷⁰ Section 10 of act of March 3, 1899, *supra*. See *Corrigan Transit Co. v. Sanitary District of Chicago*, 137 Fed. 851, 70 C. C. A. 381 (7th C. 1905), affirming 125 Fed. 611 (D. C. Ill., 1903).

⁷¹ Section 18 of act of March 3, 1899, *supra*. This was sustained as within the power of Congress "to determine what is an unreasonable obstruction to the navigation of an interstate river" in *U. S. v. Union Bridge Co.*, 143 Fed. 377 (D. C. Pa., 1906); affirmed in *Union Bridge Co. v. U. S.*, 204 U. S. 364, 27 Supm. 367, 51 L. ed. 523 (1907). As to delegation of power to Secretary, see note 66, *supra*. As to effect of failure to make provision for compensation, see § 51.

⁷² *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782 (Oct. 1876), where was denied relief against such an obstruction placed for the purpose of improvement of navigation. As to obstruction caused by bridge authorized by Congressional legislation, see § 52.

commerce,"⁷³ thus, the erection of a structure for a purpose such as transportation, manufacture, or sale wholly within a State, and having no direct reference to transportation within the scope of the commerce clause.⁷⁴

⁷³ *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 Fed. 753, 778, 810 (C. C. Cal., 1884). Here was denied the power of Congress to authorize "the miners on its public lands, or anybody else, to fill up the channels and beds of navigable waters, and destroy them for navigation or for any other useful purpose." In *Frost v. Washington County R. R. Co.*, 96 Me. 76, 51 Atl. 806, 59 L. R. A. 68 (1901), was sustained the power to authorize the obstruction of navigation by a trestle constructed for the use of a railroad corporation that operated between points in the State. The decision seems sustainable, if at all, on the ground of the connection of the railroad with others used for transportation to points outside the State. As to effect of legislation by Congress as recognizing and assenting to appropriation of water in contravention of common-law rule as to continuous flow, see *U. S. v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 706, 19 Supm. 770, 776, 43 L. ed. 1136 (1899).

By act of June 21, 1906 (34 Stat. L. 386), is regulated the construction of dams under authority of Congress.

⁷⁴ In *Cummings v. Chicago*, 188 U. S. 410, 430, 23 Supm. 472, 477, 47 L. ed. 525 (1903), it was regarded as unnecessary to decide "whether Congress may against or without the expressed will of a State give affirmative authority to private parties to erect structures in such waters." Here, in denying relief against interference by municipal authorities with the construction of a dock in navigable waters wholly within a State, it was held that the act of Congress in question did not manifest a purpose to go to that extent, and thereby to supersede the original authority of the State. To the same effect, *Calumet Grain & Elevator Co. v. Chicago*, 188 U. S. 431, 23 Supm. 477, 47 L. ed. 532 (1903). In *Montgomery v. Portland*, 190 U. S. 89, 23 Supm. 735, 47 L. ed. 965 (1903), was followed *Cummings v. Chicago* in holding that "under existing enactments the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a State cannot be said to be complete and absolute without the concurrent or joint assent of both the general and State governments." See *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 Fed. 753, 786 (C. C. Cal., 1884).

§ 50. Effectuating improvements in navigation.

The power to regulate navigation unquestionably includes the power to effectuate improvements in navigation.⁷⁵

§ 51. Duty to make compensation for property taken in exercise of power to improve navigation.

It has already been observed that the power conferred by the commerce clause is subject to limitations or restrictions prescribed by other provisions of the Constitution, thus the prohibition of the Fifth Amendment against taking private property for public use without just compensation.⁷⁶ The unquestionable power of Congress to take such property in the exercise of the power to improve navigation is subject to such prohibition.⁷⁷ As to land under navigable waters,

⁷⁵ Thus in *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782 (Oct. 1876), was sustained legislation providing for the improvement of a harbor. As to the extent of such power, see *Green Bay & Mississippi Canal Co. v. Patten Paper Co.*, 172 U. S. 58, 80, 19 Supm. 97, 105, 43 L. ed. 364 (1898). For instances of its exercise see *U. S. v. Mississippi Rum River Boom Co.*, 3 Fed. 548 (C. C. Minn., 1880); *Richardson v. U. S.*, 100 Fed. 714 (C. C. Va., 1900). As to power to establish or modify harbor line, see *Navigable Waters — Harbor Lines*, 22 Op. Atty.-Gen. 501 (1899); to designate place for deposit of material dredged in improving harbor, *Harbor Improvements*, 22 Op. Atty.-Gen. 646 (1899); *Southern Pac. Co. v. Western Pac. Ry. Co.*, 144 Fed. 160, 203 (C. C. Cal., 1906).

⁷⁶ See § 32.

⁷⁷ *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, 336, 13 Supm. 622, 630, 37 L. ed. 463 (1893); *U. S. v. Oregon Ry. & Nav. Co.*, 16 Fed. 524 (C. C. Oreg., 1883); *Richardson v. U. S.*, 100 Fed. 714 (C. C. Va., 1900). So in case of requirement of removal of obstruction. *U. S. v. Bellingham Bay Boom Co.*, 176 U. S. 211, 20 Supm. 343, 44 L. ed. 437 (1900). Recovery not allowed for damage to a ferry franchise, in *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508 (1879); *Lonergan v. Mississippi River Bridge Co.*, 2 Fed. 777 (C. C. Mo., 1881). The principle stated

although the title thereto is "in the various States and individual owners under them," it is subject to "the servitude in respect of navigation created in favor of the Federal government by the Constitution,"⁷⁸ and compensation is not required to be made

in the text was recognized in *U. S. v. City of Moline*, 82 Fed. 592 (D. C. Ill., 1897, where however the right to construct a bridge was held granted by a State subject to alteration by the State, which reservation inured to the Federal government upon the exercise of such authority by Congress). So in *Union Bridge Co. v. U. S.*, 204 U. S. 364, 27 Supm. 367, 51 L. ed. 523 (1907), affirming *U. S. v. Union Bridge Co.*, 143 Fed. 377 (D. C. Pa., 1906), compensation was not allowed for requiring alteration of bridge constructed under authority of State statute providing that it should be "constructed in such manner as meet the requisitions of the law in regard to the obstructions of navigation." Held otherwise, however, in *U. S. v. Parkersburg Branch R. R. Co.*, 143 Fed. 224, 74 C. C. A. 354 (4th C. 1906), as to bridge constructed under authority of act of Congress without reservation of right to amend, modify, or repeal.

As to statutory provisions for compensation, see *U. S. v. Jones*, 109 U. S. 513, 3 Supm. 346, 27 L. ed. 1015 (1883), affirming *Jones v. U. S.*, 48 Wis. 385, 4 N. W. 519 (1880); *Orr v. Quimby*, 54 N. H. 590 (1874).

⁷⁸ *Gibson v. U. S.*, 166 U. S. 269, 17 Supm. 578, 41 L. ed. 996 (1897). The nature of the title to such lands was elaborately discussed in *Shively v. Bowlby*, 152 U. S. 1, 14 Supm. 548, 38 L. ed. 331 (1894), affirming *Bowlby v. Shively*, 22 Oreg. 410, 30 Pac. 154 (1892). See also *Hoboken v. Pennsylvania R. R. Co.*, 124 U. S. 656, 688, 8 Supm. 643, 653, 31 L. ed. 543 (1888); *State v. Illinois Cent. R. Co.*, 33 Fed. 730, 755 (C. C. Ill., 1888); affirmed in *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 13 Supm. 110, 36 L. ed. 1018 (1892). As to power of Congress as to such land in Territory, see *Kneeland v. Korter*, 40 Wash. 359, 82 Pac. 608, 1 L. R. A. N. S. 745 (1905).

In *Coxe v. State*, 144 N. Y. 396, 408, 39 N. E. 400, 403 (1895), a grant by the State of lands under water was regarded as in contravention of the commerce clause. The ground of this decision seems not clear.

for such land.⁷⁹ One deriving an interest therein under the law of the State has no better a right to compensation than has the State itself.⁸⁰ While a riparian owner has the right to compensation for his property actually *taken* in the exercise of such power, his right to such compensation for a mere *incidental damage* to his property is authoritatively denied, but the distinction seems to be one rather difficult of application.⁸¹

⁷⁹ *Scranton v. Wheeler*, 57 Fed. 803, 6 C. C. A. 585 (6th C. 1893); reversed and remanded, but without passing on the point, in 163 U. S. 703, 16 Supm. 1206, 41 L. ed. 318 (1896). Subsequent decision in 179 U. S. 141, 21 Supm. 48, 45 L. ed. 126 (1900), affirming 113 Mich. 565, 71 N. W. 1901, 67 Am. St. Rep. 484 (1897). In 57 Fed. 803, ejectionment was held not maintainable by the riparian owner on account of the erection of a pier. Here was distinguished *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, 13 Supm. 622, 37 L. ed. 463 (1893), as a case where under the authority of Congressional legislation it was sought to remove a structure placed under the authority of a State "as an improvement to the navigation of a stream wholly within its borders."

So in *Stockton v. Baltimore & N. Y. R. R. Co.*, 32 Fed. 9, 17 (C. C. N. J., 1887), compensation was held not required for such land taken for construction of piers for bridge. So for lighthouse in *Hawkins Point Lighthouse Case*, 39 Fed. 77 (C. C. Md., 1889); reversed on another point in *Chappell v. Waterworth*, 155 U. S. 102, 15 Supm. 34, 39 L. ed. 85 (1894). See also *Soil under Navigable Waters*, 16 Op. Atty.-Gen. 479 (1880); *Improvement of Navigable Waters*, 16 Op. Atty.-Gen. 534 (1880); 17 id. 109 (1881); 18 id. 64 (1884).

⁸⁰ See decisions in note 79, *supra*.

⁸¹ Compensation was not allowed in *Gibson v. U. S.*, 166 U. S. 269, 17 Supm. 578, 41 L. ed. 996 (1897), affirming 29 Ct. of Cl. 18 (1894), for injury from the construction of a dike, consisting merely in the destruction of a landing, by preventing free egress and ingress to and from it, no water being however thrown back upon the land, and the dike not having come into physical contact with the land, or having been the cause of any such contact in any other way. So in *Scranton v. Wheeler*, 179 U. S. 141, 21 Supm. 48, 45 L. ed. 126 (1900), affirming 113 Mich. 565, 71 N. W. 1091, 67 Am. St. Rep. 484 (1897), in case of access to navigability permanently lost by reason of the construction of a pier. See

Nor is an exhaustive consideration thereof within the scope of this treatise.

§ 52. Authorization of construction of bridges.

The power to prevent obstructions to navigation, already considered, includes the power to regulate the construction of bridges. But the authority of Congress to itself authorize the construction of a bridge as a means of communication seems to rest on a somewhat different basis, that is to say, upon the power just considered to authorize the establishment and maintenance of means of commercial communication. This is certainly so as to a bridge connecting points in different States,⁸² and it seems equally clear as to a bridge connecting points in the same State, but used, for instance, as a portion of a line of railroad con-

Winifrede Coal Co. v. Central Ry. & Bridge Co., 11 Ohio Dec. (Reprint) 35 (1890). On the other hand, in *U. S. v. Lynah*, 188 U. S. 445, 23 Supm. 349, 47 L. ed. 539 (1903), compensation was allowed for destruction of value caused by permanent flooding. See however *Bedford v. U. S.*, 192 U. S. 217, 24 Supm. 238, 48 L. ed. 414 (1904), affirming 36 Ct. of Cl. 474 (1901). See also *Mills v. U. S.*, 46 Fed. 738, 12 L. R. A. 673 (D. C. Ga., 1891), and comments thereon in *U. S. v. Lynah*; *Paine Lumber Co. v. U. S.*, 55 Fed. 854 (C. C. Wis., 1893); *Frost v. Washington County R. R. Co.*, 96 Me. 76, 51 Atl. 806, 59 L. R. A. 68 (1901); *Slingerland v. International Contracting Co.*, 169 N. Y. 60, 61 N. E. 995, 56 L. R. A. 494 (1901), affirming 43 App. Div. 215, 60 N. Y. Suppl. 12 (1899); *Avery v. Fox*, 1 Abb. (U. S.) 246, 2 Fed. Cas. No. 674 (1868); *Covington Harbor Co. v. Phoenix Bridge Co.*, 10 Ohio Dec. (Reprint) 657 (1889); *Richardson v. U. S.*, 100 Fed. 714 (C. C. Va., 1900); *Williams v. U. S.*, 104 Fed. 50 (C. C. S. C., 1900); *Lowndes v. U. S.*, 105 Fed. 838 (C. C. S. C., 1901); article in 2 Mich. Law Rev. 670 (1904), by J. C. Donnelly.

⁸² *Luxton v. North River Bridge Co.*, 153 U. S. 525, 14 Supm. 891, 38 L. ed. 808 (1894), where was sustained an act incorporating a corporation to construct a bridge across the North River between New York and New Jersey. See *Lincks v. Amend*, 32 Atl. 755 (Ct. Ch. N. J., 1895); *People v. Kelly*, 76 N. Y. 475

necting points in different States.⁸³ It follows that the obstruction to navigation caused by a bridge thus authorized "must be deemed to be a burden lawfully imposed upon the free navigation of the river, of which no one can legally complain."⁸⁴

(1879). So of an act conferring power upon a State corporation to construct a bridge across Staten Island Sound between New York and New Jersey, though such construction had been expressly prohibited by one of such States (New Jersey). *Decker v. Baltimore & N. Y. Ry. Co.*, 30 Fed. 723 (C. C. N. Y., 1887); *Pennsylvania Ry. Co. v. Baltimore & N. Y. Ry. Co.*, 37 Fed. 129 (C. C. N. Y., 1888. See as to burden of proof of compliance with conditions of grant of authority). See *Stockton v. Baltimore & N. Y. R. R. Co.*, 32 Fed. 9 (C. C. N. J., 1887); *State v. Boller*, 47 Fed. 415 (C. C. N. J., 1889), involving same subject-matter. See generally *Commissioners of Parks, etc., of Detroit v. Common Council of Detroit*, 80 Mich. 663, 45 N. W. 508 (1890). As to acts allowing erection of bridges across Mississippi river, see *Richmond v. Dubuque & Sioux City R. R. Co.*, 33 Iowa, 422, 499 (1872).

By act of March 23, 1906 (34 Stat. L. 84), is regulated the construction of bridges under authority of Congress.

⁸³ See *Union Pacific R. R. Co. v. Mason City, etc., R. R. Co.*, 199 U. S. 160, 26 Supm. 19, 50 L. ed. 134 (1905).

⁸⁴ *U. S. v. Keokuk & H. Bridge Co.*, 45 Fed. 178 (D. C. Iowa, 1891). As to relief against obstruction caused by bridge constructed under authority of Congress, see *U. S. v. Pittsburgh & L. E. R. R. Co.*, 26 Fed. 113 (D. C. Pa., 1886); *St. Louis & St. Paul Packet Co. v. Keokuk & Hamilton Bridge Co.*, 31 Fed. 755 (C. C. Iowa, 1887); *Texarkana & Ft. S. Ry. Co. v. Parsons*, 74 Fed. 408, 20 C. C. A. 481 (8th C. 1896); *E. A. Chatfield Co. v. City of New Haven*, 110 Fed. 788 (C. C. Conn., 1901).

CHAPTER III.

POWER OF CONGRESS AND OF THE STATES RESPECTIVELY.

- SECTION 53. Exercise of power by Congress, as exclusive of exercise of power by State.
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55. Power of Congress whether exclusive in all cases.
56. Alleged distinction between "matters national" and "matters of local interest."
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60. The same; promotion of public convenience.
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63. The same; whether individual or corporation.
64. Transportation by domestic corporation.
65. Transportation by foreign corporation.
66. Power of eminent domain.
67. Regulation of rates of transportation.
68. Combinations among corporations; *i. e.*, consolidation.
69. Invalidity of restrictions imposed under authority of State.
70. Restriction by way of tax or other condition.
71. The same; restriction upon transportation of persons; immigration.
72. The same; restriction upon navigation; vessels enrolled and licensed under authority of Congress.
73. Restriction as to transaction not within scope of commerce clause, though imposed upon one engaged in transportation within scope thereof.
- 73a. *Maine v. Grand Trunk Ry. Co.*
74. The same; in case of one engaged in public employment.
75. Restriction upon contract of sale.
- 75a. *Robbins v. Shelby County Taxing District.*
76. The same; in case of transportation not within scope of commerce clause.
77. The same; in case of property transported into State and remaining in original package.
78. Discrimination against articles transported into State, or against nonresident.

§ 53. Exercise of power by Congress, as exclusive of exercise of power by State.

Although it is not expressly provided that the power of Congress to regulate shall be exclusive, it is obvious that, in order to be effective, the exercise thereof must exclude the exercise of any conflicting power under authority of a State, inconsistent State legislation being to that extent superseded.¹ This is well illustrated in case of exercise of the power by way of removing obstructions to navigation, it having already been seen that in such case Congress is "not concluded by anything that the States, or that individuals by their authority or acquiescence, have done."² So as to the effect of establishment and maintenance of means of communication as excluding a conflicting grant under authority of a State,³ so of regulation of immigration,⁴ or the conduct of those engaged in commerce.⁵ But legislation by a State will not on this

¹ The decision in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23 (1824), the importance of which seems to us to have been vastly and injuriously exaggerated, substantially involved nothing more than an application of this obvious rule. See § 72. For recognitions of such rule see, for instance, *County of Mobile v. Kimball*, 102 U. S. 691, 698, 26 L. ed. 238 (Oct. 1880); *Leisy v. Hardin*, 135 U. S. 100, 109, 10 Supm. 681, 684, 34 L. ed. 128 (1890). See also *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 485, 8 Supm. 689, 698, 31 L. ed. 700 (1888). As to transportation of live stock, see *Reid v. Colorado*, 187 U. S. 137, 146, 23 Supm. 92, 95, 47 L. ed. 108 (1902).

² See § 48; *Gilman v. Philadelphia*, 3 Wall. 713, 727, 18 L. ed. 96 (Dec. 1865).

³ See *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 11, 24 L. ed. 708 (Oct. 1877).

⁴ See *People v. Compagnie Générale Transatlantique*, 107 U. S. 59, 63, 2 Supm. 87, 90, 27 L. ed. 383 (1883).

⁵ Thus see as to effect of Interstate Commerce Act, *Gulf, Colorado & Santa Fe Ry. Co. v. Hefley*, 158 U. S. 98, 15 Supm. 802, 39 L. ed. 910 (1895); *Interstate Commerce Commission v. Detroit, Grand Haven, etc., Ry. Co.*, 167 U. S. 633, 642, 17 Supm. 986, 989, 42 L. ed. 306 (1897); *People ex rel. Stead v. Chicago, Indianapolis,*

ground be determined to be invalid as inconsistent with legislation by Congress, "unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."⁶

§ 54. Exclusion of exercise of power of State, in absence of exercise of power by Congress.

From the obvious rule just stated, it is a long, and, as it clearly seems to us, an unwarranted step, to the position that in any case the power of Congress to regulate commerce is, *in the absence of exercise thereof*, exclusive of exercise of the power of regulation of such commerce under authority of a State. As already observed it is not expressly provided that the power of Congress shall be exclusive, and to hold that it is seems unjustifiable according to established rules of construction.⁷ In this view, *in all cases the power of Congress is merely concurrent*, there being reserved to the States power to regulate commerce in any case otherwise within their jurisdiction. Nevertheless a discussion of the point seems purely academic. For nothing is better established than that, under certain conditions at least, it is only Congress that can effectively legislate, any legislation by a State being invalid, even in the absence of legislation by Congress. As it has been expressed, as to such cases, "so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will

etc., *Ry. Co.*, 223 Ill. 581, 79 N. E. 144 (1906); *St. Joseph & Grand Island R. R. Co. v. Palmer*, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335 (1893).

⁶ *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 623, 18 Supm. 488, 492, 42 L. ed. 878 (1898). See *Compagnie Francaise de Navigation, etc. v. Louisiana State Board of Health*, 186 U. S. 380, 392, 22 Supm. 811, 817, 46 L. ed. 1209 (1902).

⁷ See Prentice & Egan's Commerce Clause, p. 12, where it is pointed out that "the first view which generally obtained upon this subject" was that such power is not exclusive.

that such commerce shall be free and untrammelled, and any regulation of the subject by the States is repugnant to such freedom.”⁸

§ 55. Power of Congress whether exclusive in all cases.

Assuming then as well established the rule that, under certain conditions at least, the power of Congress to regulate is exclusive of any exercise of such power under authority of a State, even in the absence

⁸*Brown v. Houston*, 114 U. S. 622, 631, 5 Supm. 1091, 1095, 29 L. ed. 257 (1885). To the same effect, *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347 (Oct. 1875); *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547 (Oct. 1877); *County of Mobile v. Kimball*, 102 U. S. 691, 697, 26 L. ed. 238 (Oct. 1880); *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Supm. 185, 27 L. ed. 442 (1883); *Transportation Co. v. Parkersburg*, 107 U. S. 691, 702, 2 Supm. 732, 741, 27 L. ed. 584 (1883); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Supm. 826, 29 L. ed. 158 (1885); *Walling v. Michigan*, 116 U. S. 446, 6 Supm. 454, 29 L. ed. 691 (1886); *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Supm. 592, 30 L. ed. 694 (1887); *Leisy v. Hardin*, 135 U. S. 100, 109, 10 Supm. 681, 684, 34 L. ed. 128 (1890); *Re Rahrer*, 140 U. S. 545, 11 Supm. 865, 35 L. ed. 572 (1891); *Brennan v. Titusville*, 153 U. S. 289, 302, 14 Supm. 829, 832, 38 L. ed. 719 (1894); *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 212, 14 Supm. 1087, 1090, 38 L. ed. 962 (1894); *Pittsburg & Southern Coal Co. v. Bates*, 156 U. S. 577, 15 Supm. 415, 39 L. ed. 538 (1895); *Western Union Tel. Co. v. James*, 162 U. S. 650, 655, 16 Supm. 934, 936, 40 L. ed. 1105 (1896).

The point, though incidentally touched upon, was not involved in *Gibbons v. Ogden*, 9 Wheat. 1, 209, 6 L. ed. 23 (1824), where the decision was expressly based on the ground of the State legislation in question being in conflict with legislation by Congress. See § 72.

As to the exercise of such power with the assent of Congress, see §§ 91, 99.

It may not be entirely clear whether Congress, acting in its capacity as local legislature for the District of Columbia, would be subject to the restrictions thus applicable to the States generally. Compare *Beitzell v. District of Columbia*, 21 App. Cas. (D. C.) 49 (1903).

of exercise of the power by Congress, there arises the question whether it is not exclusive *in all cases*. We submit that it is, and for a time, at least, such view obtained some countenance.⁹ That is to say, in this view, strictly speaking *in no case can commerce within the scope of the commerce clause be regulated under authority of a State*. It is true, indeed, that action taken under authority of a State may affect such commerce, but we submit that *in every case this is merely the incidental result of the exercise under authority of a State, not of the power to regulate commerce, but of some other distinct power reserved to the States*. "All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from *distinct powers*; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality."¹⁰ We shall endeavor hereafter to demonstrate the application of

⁹ That however there has been no adjudication of the Supreme Court, at least, to that effect, see *County of Mobile v. Kimball*, 102 U. S. 691, 699, 26 L. ed. 238 (Oct. 1880), and comments therein on language of Marshall, C. J., in *Gibbons v. Ogden*. See also comments in *Walling v. Michigan*, 113 U. S. 446, 6 Supm. 454, 29 L. ed. 691 (1886), on language of Johnson, J., in *Gibbons v. Ogden*, and of Grier, J., in the *Passenger Cases*, 7 How. 283, 462, 12 L. ed. 702 (Jan. T. 1849).

In general harmony with the views herein expressed see article in 53 Am. Law Reg. (O. S.) 529, 593 (1905), by J. S. Rogers. See also articles in 28 Am. Law Reg. (N. S.) 733 (1889), by A. H. Wintersteen; in 24 Am. Law Rev. 25 (1890), by C. A. Culberson; in 1 Harv. Law Rev. 159 (1887), by L. M. Greeley; in 5 Columbia Law Rev. 298 (1905), by D. W. Brown.

¹⁰ Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. 1, 204, 6 L. ed. 23 (1824). See dissenting opinion of Moody, J., in *Howard v. Illinois Central R. R. Co.* (Supm. Ct. U. S., 1908.)

this principle in detail; an illustration will suffice here. Either Congress or a State may take action with reference to the transportation of diseased live stock from State to State, and in their outward aspect there may be no distinction between action in the one case and in the other. But Congress is *directly regulating the transportation of such live stock*; the State is *directly regulating the sale* thereof within its limits, prohibition of such transportation from State to State being merely an essential incident of the regulation of sale within the State. It must be admitted, and will, indeed, hereafter be seen that there are decisions of the Supreme Court not in harmony with the distinction just stated, but it would seem to us to be better to regard them as departures from sound principle than to manufacture a new and arbitrary distinction for the purpose of explaining them.

§ 56. Alleged distinction between "matters national" and "matters of local interest."

The principle for which we have just contended seems not wholly to have escaped the attention of the Supreme Court, by which it has been declared that the powers as exercised by the States "though they may be said to *partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers.*"¹¹ Nevertheless there seems to have been established in such court a distinction, said to be "no longer to be regarded as open to re-ex-

¹¹ *Leisy v. Hardin*, 135 U. S. 100, 109, 10 Supm. 681, 684, 34 L. ed. 128 (1890). Compare as to distinction "between *commerce as strictly defined and its local aids or instruments or measures taken for its improvement*" *County of Mobile v. Kimball*, 102 U. S. 691, 702, 26 L. ed. 238 (Oct. 1880). For like allusions to "aids to commerce" see *Escanaba Co. v. Chicago*, 107 U. S. 678, 687, 2 Supm. 185, 192, 27 L. ed. 442 (1883); *Cardwell v. American Bridge Co.*, 113 U. S. 205, 5 Supm. 423, 28 L. ed. 959 (1885).

amination,"¹² between cases in which the power of Congress is, and cases in which it is not, exclusive, of any exercise of such power under authority of a State, even in the absence of exercise of the power by Congress; that is to say, a distinction between "*matters national*" and "*matters of local interest.*" This, as it seems to us, needless and even harmful distinction, is vaguely, not to say confusedly, said to be applicable according to "*the nature of the subject to be regulated.*"¹³ More fully stated the distinction is that the power of Congress is exclusive in matters that are "in their nature national or admit only of one uniform system or plan of regulation."¹⁴ "*The power*

¹² *Leisy v. Hardin*, *supra* (135 U. S. 118, 10 Supm. 687).

¹³ *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96 (Dec. 1865). Compare statement in *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 483, 8 Supm. 689, 697, 31 L. ed. 700 (1888), of question as one to be "considered in each case as it arises."

¹⁴ *Cooley v. Port Wardens*, 12 How. 299, 319, 13 L. ed. 996 (Dec. T. 1851). The distinction here stated has been frequently recognized or applied; thus in *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96 (Dec. 1865); *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347 (Oct. 1875); *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 23 L. ed. 543 (Oct. 1875); *County of Mobile v. Kimball*, 102 U. S. 691, 697, 26 L. ed. 238 (Oct. 1880); *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Supm. 185, 27 L. ed. 442 (1883); *Transportation Co. v. Parkersburg*, 107 U. S. 691, 2 Supm. 732, 27 L. ed. 584 (1883); *Cardwell v. American Bridge Co.*, 113 U. S. 205, 5 Supm. 423, 28 L. ed. 959 (1885); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204, 5 Supm. 826, 828, 29 L. ed. 158 (1885); *Brown v. Houston*, 114 U. S. 622, 630, 5 Supm. 1091, 1095, 29 L. ed. 257 (1885); *Walling v. Michigan*, 116 U. S. 446, 6 Supm. 454, 29 L. ed. 691 (1886); *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Supm. 592, 30 L. ed. 694 (1887); *Leisy v. Hardin*, 135 U. S. 100, 108, 10 Supm. 681, 684, 34 L. ed. 128 (1890); *Re Rahrer*, 140 U. S. 545, 11 Supm. 865, 35 L. ed. 572 (1891); *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 212, 14 Supm. 1087, 1090, 38 L. ed. 962 (1894); *Pittsburg & Southern Coal Co. v. Bates*, 156 U. S. 577, 15 Supm. 415, 39 L. ed. 538 (1895); *Western Union Tel. Co. v. James*, 162 U. S.

to regulate commerce may be exercised by the States,"¹⁵ as well as by Congress, as to matters "of local interest only incidentally affecting foreign and interstate commerce."¹⁶ As to the latter "inaction of Congress * * * unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authority."¹⁷ Rightly understood, how-

650, 655, 16 Supm. 934, 936, 40 L. ed. 1105 (1896); *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Supm. 817, 47 L. ed. 995 (1903).

As to the evils alleged to result from "conflicting regulations of different States," and as to the desirability of "uniformity of regulation," see *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547 (Oct. 1877); *Gloucester Ferry Co. v. Pennsylvania*, *supra*; *Robbins v. Shelby County Taxing District*, *supra*; *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 486, 8 Supm. 689, 699, 31 L. ed. 700 (1888).

See article in 4 Columbia Law Rev. 490 (1904), by D. W. Brown.

¹⁵ *Gilman v. Philadelphia*, *supra*.

¹⁶ So characterized in *Brown v. Houston*, 114 U. S. 622, 630, 5 Supm. 1091, 1095, 29 L. ed. 257 (1885); *Pittsburg & Southern Coal Co. v. Bates*, 156 U. S. 577, 15 Supm. 415, 39 L. ed. 538 (1895). To similar effect, *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96 (Dec. 1865); *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347 (Oct. 1875); *County of Mobile v. Kimball*, 102 U. S. 691, 698, 26 L. ed. 238 (Oct. 1880); *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Supm. 185, 27 L. ed. 442 (1883); *Cardwell v. American Bridge Co.*, 113 U. S. 205, 5 Supm. 423, 28 L. ed. 959 (1885); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204, 5 Supm. 826, 828, 29 L. ed. 158 (1885); *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 465, 6 Supm. 1114, 1119, 30 L. ed. 237 (1886). See also *Leisy v. Hardin*, 135 U. S. 100, 108, 10 Supm. 681, 684, 34 L. ed. 128 (1890).

¹⁷ *County of Mobile v. Kimball*, 102 U. S. 691, 699, 26 L. ed. 238 (Oct. 1880). In *Bowman v. Chicago & Northwestern Ry. Co.*,

ever, such statement of the distinction may perhaps be properly regarded as merely a somewhat vague and confused statement of the distinction that we have contended for. Commerce has already been defined as *transportation (not necessarily all transportation but certainly) including transportation of persons and tangible property and (at least under certain conditions) of intelligence*. By what is perhaps a rather forced interpretation, commerce as thus defined may be identified with matters that are "in their nature national or admit only of one uniform system or plan of regulation;" while, on the other hand, the exercise under the authority of a State of a distinct power, thus to regulate sales within its limits, incidentally involving the prohibition of transportation from or to another State of the article in question, may likewise be identified as the regulation of matters "of local interest only incidentally affecting" commerce within the scope of the commerce clause. But at best the true distinction seems thus but very imperfectly stated.

§ 57. Power as exclusive of application of common-law rules.

The unsoundness of the view already considered, of the exclusiveness of the power of Congress, in the absence of exercise thereof, may be further indicated by what seems to be the well-established rule that the existence of such power in Congress does not prevent the application even in the courts of a State, as well as the Federal courts, of merely *common-law* rules,

125 U. S. 465, 481, 8 Supm. 689, 696, 31 L. ed. 700 (1888), this distinction was said to have been "first plainly pointed out by Curtis, J., in *Cooley v. Port Wardens*," *supra*, but that it had already been stated by Woodbury, J., in *The License Cases*, 5 How. 504, 624, 12 L. ed. 256 (Jan. T. 1847), see Prentice & Egan's Commerce Clause, p. 24. See *Leisy v. Hardin*, 135 U. S. 100, 118, 10 Supm. 681, 687, 34 L. ed. 128 (1890).

that if statutory might be regarded as an invalid exercise of the authority of the State. It is said that "the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment."¹⁸ The artificiality of the distinction between common-law and statutory rules, as thus applied, may be more apparent on a consideration of what would be the effect as to a statute merely declaratory of the common law.¹⁹ It is rules applicable to the duties and liabilities of carriers, thus as to discrimination²⁰ and

¹⁸ *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92, 21 Supm. 561, 45 L. ed. 765 (1901), affirming 58 Neb. 192, 78 N. W. 519 (1899). But see *Pennsylvania R. R. Co. v. Hughes*, *infra*. See Hendrick on "The Power to Regulate Corporations and Commerce;" article in 10 Va. Law Reg. 475 (1904), by Hunsdon Cary. As to Congress, by refraining from action, "adopting as its own rules and regulations applicable to business of carrier, see *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547 (Oct. 1877). As to application of rule of reasonableness to rates for transportation, see *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 222, 14 Supm. 1087, 1093, 38 L. ed. 962 (1894).

¹⁹ That it would be given the same effect as the common law may be suggested by *Telegraph Co. v. Mellon*, 100 Tenn. 429, 45 S. W. 443 (1898). In *H. L. Halliday Milling Co. v. Louisiana & N. W. R. R. Co.*, 98 S. W. 374 (Supm. Ct. Ark., 1906), relief against overcharge by carrier was allowed on common-law principles, even though the action had been based on a statute said by the court to be declaratory of the common law, but under which the action would not have been maintained, in view of legislation by Congress on the subject. So held in view of section 22 of the Interstate Commerce Act saving common-law remedies. But see note 20, *infra*.

²⁰ Thus, in *Western Union Tel. Co. v. Call Publishing Co.*, *supra*, it was held no objection to recovery in a State court for illegal discrimination by a telegraph corporation, that the services rendered were a matter of interstate commerce. In *Murray v. Chicago & N. W. Ry. Co.*, 62 Fed. 24 (C. C. Iowa, 1894); affirmed in 92 Id. 868, 35 C. C. A. 62 (8th C. 1899), recovery was allowed

liability for negligence,²¹ that have been most conspicuously applied in this connection.

under like conditions in an action removed to the Federal court, against the objection that "there was no act of Congress or other law regulating commerce between the several States." Contrary views had been expressed in *Swift v. Philadelphia & R. R. Co.*, 58 Fed. 858 (C. C. Ill., 1893), subsequent decision in 64 Id. 59 (C. C. Ill., 1894); *Gatton v. Chicago, Rock Island & Pacific Ry. Co.*, 95 Iowa, 112, 63 N. W. 589, 28 L. R. A. 556 (1895); *Heiserman v. Burlington, Cedar Rapids, etc., Ry. Co.*, 63 Iowa, 732, 18 N. W. 903 (1884). See also *Sheldon v. Wabash R. R. Co.*, 105 Fed. 785 (C. C. Ill., 1900). Compare *Kinnavey v. Terminal R. R. Assoc. of St. Louis*, 81 Fed. 802 (C. C. Mo., 1897); *Green v. City of Bridgeton*, 10 Fed. Cas. No. 5,754 (D. C. Ga., 1879); *Larabee Flour Mills Co. v. Missouri Pacific Ry Co.*, 74 Kan. 808, 88 Pac. 72 (1906). So in *State v. C., N. O. & T. P. Ry. Co.*, 47 Ohio St. 130, 23 N. E. 928 (1890), were sustained *quo warranto* proceedings against a domestic corporation on account of discrimination in interstate transportation.

But the application of the rule to this class of cases has been restricted by the Interstate Commerce Act. On the ground of the existence of the remedy thereby provided, in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Supm. 350, 51 L. ed. 553 (1907), reversing *Abilene Cotton Oil Co. v. Texas & P. Ry. Co.*, 85 S. W. 1052 (Tex. Civ. App. 1905); *Texas & Pacific Ry. Co. v. Cisco Oil Mill*, 204 U. S. 449, 27 Supm. 358, 51 L. ed. 562 (1907), relief against the exaction of unreasonable rates was denied. So held notwithstanding the provision of section 22 of the act. To the contrary seems *Banner v. Wabash R. R. Co.*, 131 Iowa, 405, 108 N. W. 759 (1906). And see *H. L. Halliday Milling Co. v. Louisiana & N. W. R. R. Co.*, note 19, *supra*. Compare *Danciger v. Wells-Fargo & Co.*, 154 Fed. 379 (C. C. Mo., 1907). In *Iron Mountain R. R. Co. v. City of Memphis*, 96 Fed. 113, 125, 37 C. C. A. 410, 423 (6th C. 1899), a contract between a railroad corporation and a municipality against discrimination as to rates of transportation was held enforceable, even as applicable to interstate transportation.

²¹ Thus effect was given to the rule denying the validity of a contract for exemption from liability for negligence in *Davis v. Chicago, Milwaukee & St. Paul Ry. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935 (1896).

It was in this connection that the distinction under consideration seems to have been entirely overlooked, in *Pennsylvania R. R.*

§ 58. Incidental effect of exercise of reserved powers of State.

Unaffected by the grant of powers to Congress are numerous powers reserved to the States. "For the purposes of its policy, a State has legislative control, exclusive of Congress, within its territory, of all persons, things, and transactions of strictly internal concern."²² It is equally true that such powers may be extensively and validly exercised, though commerce within the scope of the commerce clause is thereby affected. And this is so whether such exercise of the power of the State be regarded as, strictly speaking, a

Co. v. Hughes, 191 U. S. 477, 24 Supm. 132, 48 L. ed. 268 (1903), affirming *Hughes v. Pennsylvania R. R. Co.*, 202 Pa. St. 222, 51 Atl. 990, 63 L. R. A. 513, 90 Am. St. Rep. 713 (1902), where in giving effect to the *common-law rule* recognized in the State courts (though contrary to that recognized in the Federal courts), denying the right of a carrier to limit its liability for negligence (see § 105), there was applied as "virtually decisive," *Chicago, Milwaukee & St. Paul Ry. Co. v. Solan*, 169 U. S. 133, 18 Supm. 289, 42 L. ed. 688 (1898), where was given effect to a State statute denying such right of a carrier, it being said: "*We can see no difference in the application of the principle based upon the manner in which the State requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the State courts.*" It seems clear enough that, for the sake of consistency, the court should have followed *Western Union Tel. Co. v. Call Publishing Co.*, rather than *Chicago, Milwaukee, etc., Ry. Co. v. Solan*. As to when legislation by Congress does not abrogate application of common-law rules to liability of carrier for negligence, see *Cheboygan Lumber Co. v. Delta Transp. Co.*, 100 Mich. 16, 58 N. W. 630 (1894). As to application of Interstate Commerce Act, see *McManus v. Oregon Short Line R. R. Co.*, 118 Mo. App. 152, 94 S. W. 743 (906).

²² *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 493, 8 Supm. 689, 702, 31 L. ed. 700 (1888). See *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Supm. 185, 27 L. ed. 442 (1883); *Cardwell v. American Bridge Co.*, 113 U. S. 205, 5 Supm. 423, 28 L. ed. 959 (1885); *Crutcher v. Kentucky*, 141 U. S. 47, 11 Supm. 851, 35 L. ed. 649 (1891); *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 209, 14 Supm. 1087, 1089, 38 L. ed. 962 (1894).

regulation of commerce or as merely incidentally affecting such commerce. Intolerable would be the conclusion that the exercise of the power of a State is to be limited to cases wherein such commerce is not at all affected. It is said that "in modern societies every part is related so organically to every other that what affects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that in the working of a statute there is some tendency logically discernible to interfere with commerce * * * Practical lines have to be drawn and distinctions of degree must be made."²³ Hence

²³ *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 23 Supm. 206, 47 L. ed. 328 (1903). The following are here referred to by way of illustration merely, as instances of action under State authority held sustainable, though, it may be, affecting such commerce. In some instances it is difficult to see even plausibility in the contention that it was at all affected.

Requirement that seller of patent rights file certain documents, *Brechbill v. Randall*, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695 (1885); that railroad leases be recorded, *Commonwealth v. Chesapeake & Ohio Ry. Co.*, 101 Ky. 159, 40 S. W. 250 (1897). Regulations as to deposit of refuse, etc., in navigable waters, *City of Ogdensburgh v. Lyon*, 7 Lans. (N. Y.) 215 (1872); *Mayor, etc., of N. Y. v. Fergusson*, 23 Hun (N. Y.) 594 (1881). Requirement of license as condition of residing on watercraft, *Robertson v. Commonwealth*, 101 Ky. 285, 40 S. W. 920 (1897). Suppression of gambling with reference to contests outside of State, *State v. Stripling*, 113 Ala. 120, 21 So. 409, 36 L. R. A. 81 (Nov. T. 1896). Prohibition of dealing in futures, *Alexander v. State*, 86 Ga. 246, 12 S. E. 408, 10 L. R. A. 859 (1890). Imposition of criminal liability for engaging in pool selling, as applicable to offense that included transmission of money by telegraph to another State, *State v. Harbourne*, 70 Conn. 484, 40 Atl. 179, 40 L. R. A. 607, 66 Am. St. Rep. 126 (1898). To like effect, *City of Louisville v. Wehmhoff*, 116 Ky. 812, 76 S. W. 876, 79 id. 201 (1903); *Ames v. Kirby*, 71 N. J. Law, 442, 59 Atl. 558 (1904); *Lacey v. Palmer*, 93 Va. 159, 24 S. E. 930, 57 Am. St. Rep. 795 (1896).

it is said that "in conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution * * * And it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water,

Prohibition of use of arms or seal of State for advertising or commercial purposes, *Commonwealth v. R. I. Sherman Manuf. Co.*, 189 Mass. 76, 75 N. E. 71 (1905). Requirement that grain commission merchants report to persons entrusting them with grain for sale, *State v. Edwards*, 94 Minn. 225, 102 N. W. 697, 69 L. R. A. 667 (1905). See also *State v. Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442, 77 Am. St. Rep. 681 (1899). Imposition of criminal liability for enticing seamen to desert from vessel, as applicable to foreign vessel, and see as to effect of R. S. § 4601, *Ex parte Young*, 36 Oreg. 247, 59 Pac. 707, 48 L. R. A. 153, 78 Am. St. Rep. 772 (1900). To like effect *Handel v. Chaplin*, 111 Ga. 800, 36 S. E. 979, 51 L. R. A. 720 (1900). Provision as to venue of suits against railroad corporations, *St. Louis Southwestern Ry. Co. of Texas v. Wester*, 96 S. W. 769 (Tex. Civ. App. 1906); *St. Louis, I. M. & S. Ry. Co. v. Moon*, 103 S. W. 1176 (Tex. Civ. App. 1907). Enforcement of lien against vessel, *The Winnebago*, 205 U. S. 354, 27 Supm. 509, 51 L. ed. 836 (1907). Garnishment statute as applicable to interstate carrier, *Landa v. Holck*, 129 Mo. 663, 31 S. W. 900, 50 Am. St. Rep. 459 (1895); *Johnson v. Union Pac. R. R. Co.*, 145 Fed. 249 (C. C. R. I., 1906); *Southern Flour & Grain Co. v. Northern Pacific Ry. Co.*, 127 Ga. 626, 56 S. E. 742, 9 L. R. A. N. S. 853 (1907). But cars used in transportation within the scope of the commerce clause were held not subject to attachment

or engaged in commerce, foreign or interstate, or in any other pursuit.”²⁴

“Local laws of the character mentioned have their source in the powers which the States reserved and in *Wall v. N. & W. R. R. Co.*, 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, 94 Am. St. Rep. 948 (1903). To like effect, in view of the Interstate Commerce Act, *Connery v. Quincy, Omaha, etc., R. R. Co.*, 92 Minn. 20, 99 N. W. 365, 64 L. R. A. 624, 104 Am. St. Rep. 659 (1904); *George D. Shore v. Baltimore & O. R. R. Co.*, 57 S. E. 526 (Supm. Ct. S. C. 1907). Prohibition of sale of bonds of foreign government in nature of lottery tickets, *Ballock v. State*, 73 Md. 1, 20 Atl. 184, 8 L. R. A. 671, 25 Am. St. Rep. 559 (1890). Usury laws, *Missouri, Kansas & Texas Trust Co. v. Krumseig*, 172 U. S. 351, 361, 19 Supm. 179, 183, 43 L. ed. 474 (1899). Prohibition against procuring county supplies outside of State, *Tribune Printing & Binding Co. v. Barnes*, 7 N. D. 591, 75 N. W. 904 (1898). Selection by municipal authorities of product of foreign country for paving, *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 24 Supm. 784, 48 L. ed. 1142 (1904); *Barber Asphalt Paving Co. v. Field*, 188 Mo. 182, 86 S. W. 860 (1905). Provision for uniform system of school text-books, *Dickinson v. Cunningham*, 140 Ala. 527, 545, 37 So. 345, 350 (Nov. T. 1903).

²⁴ *Sherlock v. Alling*, 93 U. S. 99, 103, 104, 23 L. ed. 819 (Oct. 1876). This language was quoted with approval in *Plumley v. Massachusetts*, 155 U. S. 461, 473, 15 Supm. 154, 158, 39 L. ed. 223 (1894); *Pittsburg & Southern Coal Co. v. Louisiana*, 156 U. S. 590, 15 Supm. 459, 39 L. ed. 544 (1895); *Louisville & Nashville R. R. Co. v. Kentucky*, 161 U. S. 677, 701, 16 Supm. 714, 724, 40 L. ed. 849 (1896).

See also *Geer v. Connecticut*, 161 U. S. 519, 534, 16 Supm. 600, 606, 40 L. ed. 793 (1896); *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 632, 18 Supm. 488, 495, 42 L. ed. 878 (1898); *New Mexico ex rel. McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 27 Supm. 1, 51 L. ed. 78 (1906).

As to “good faith” in enactment of State legislation, as element to be considered, see *Austin v. Tennessee*, 179 U. S. 343, 349, 21 Supm. 132, 134, 45 L. ed. 225 (1900).

That such power of the State is to be exercised by its legislature rather than by its courts acting independently of statute, see *State v. Kansas & T. Coal Co.*, 96 Fed. 353, 368 (C. C. Ark., 1899); reversed on other grounds in *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 22 Supm. 47, 46 L. ed. 144 (1901).

never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution and considered in their own nature, regulations of interstate commerce simply because for a limited time or to a limited extent they cover the field occupied by those engaged in such commerce.”²⁵

§ 59. The same; police power.

It being then clear that there are powers reserved to the States that may be validly exercised, though commerce within the scope of the commerce clause is thereby affected, it remains to consider what are such powers. It has been complained that “the line of distinction between what constitutes an interference with commerce and what is a legitimate police regulation is exceedingly dim and shadowy.”²⁶ The existence of the difficulty may be admitted, though, strictly speaking, it is not within the scope of this treatise to attempt to solve it. To do so would involve a general inquiry as to the extent of the powers reserved to the States, the exercise of any of which may affect such commerce.²⁷ It will be found hereafter, however, that, speaking generally, such powers may be resolved into a few tolerably well-defined classes, so far as concerns their effect upon such commerce. These classes may be characterized as powers (1) *to establish and maintain means of transportation.* (2) *To control persons*

²⁵ *Hennington v. Georgia*, 163 U. S. 299, 317, 16 Supm. 1086, 1093, 41 L. ed. 166 (1896).

²⁶ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215, 5 Supm. 826, 834, 29 L. ed. 158 (1885), quoting from *Cooley's Constitutional Limitations*, 732.

²⁷ For a specification of some of such powers, see *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 497, 8 Supm. 689, 704, 31 L. ed. 700 (1888), quoting from *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 493, 7 Supm. 592, 594, 30 L. ed. 694 (1887).

and property. (3) *To regulate the conduct and liability of those engaged in transportation within the scope of the commerce clause*, to which may perhaps properly be added the power of taxation. Whether that much abused term, the “police power,” is in any given case appropriately applied is, however, a matter of comparatively little importance. That question seems one of the use of words.²⁸ The substantial question in any given case is *whether or not there is a valid exercise of a power reserved to the States*, whether or not within the scope of the “police power.” It has been well said as to the police power that “no definition of it and no urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution. Nothing is gained in the argument by calling it the police power.”²⁹ It will

²⁸ See *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, 297, 19 Supm. 465, 470, 43 L. ed. 702 (1899); and, generally, as to the police power, article in 25 Am. Law Rev. 159 (1891), by C. C. Bonney; in 4 Columbia Law Rev. 153 (1904), by C. C. Marshall; in *Id.* 563 (1904), by Paul Fuller; in 7 *Id.* 322 (1907), by W. W. Cook.

In *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 464, 6 Supm. 1114, 1118, 30 L. ed. 237 (1886), in sustaining a quarantine regulation, it was regarded as unnecessary to determine whether this was to be classed among the “police powers” of the States.

²⁹ *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 271, 23 L. ed. 543 (Oct. 1875). The same doctrine was recognized or applied in *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527 (Oct. 1877); *Morgan's Steamship Co. v. Louisiana Board of Health*, *supra*; *Leisy v. Hardin*, 135 U. S. 100, 108, 10 Supm. 681, 683, 34 L. ed. 128 (1890); *Crutcher v. Kentucky*, 141 U. S. 47, 11 Supm. 851, 35 L. ed. 649 (1891); *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, 298, 19 Supm. 465, 470, 43 L. ed. 702 (1899); *Reid v. Colorado*, 187 U. S. 137, 151, 23 Supm. 92, 97, 47 L. ed. 108 (1902).

hereafter be seen that under the influence of a confused conception of the nature and scope of such power, have been sustained what are, in our view at least, unjustifiable regulations of commerce under the authority of a State, that is to say, regulations that find no justification as the incidental result of the exercise of a power reserved to the States.

§ 60. The same; promotion of public convenience.

The powers reserved to the States, the exercise of which may validly affect commerce within the scope of the commerce clause, include not only "regulations pertaining to the health, morals, or safety of the public," but may include "regulations designed merely to promote the public convenience" and general welfare. And here again it may be said that it is a matter of comparatively little importance whether the term "police power" is appropriately applied to such a regulation.³⁰ "The power of the State by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, or the public safety. Whether legislation of either kind is inconsistent with any power granted to the general government is to be determined by the same rules."³¹ The "reasonableness or unreasonableness of a State enactment" in a given case is said to be "an element in the general inquiry."³²

³⁰ *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, 292, 297, 19 Supm. 465, 468, 470, 43 L. ed. 702 (1899).

³¹ 173 U. S. 300, 19 Supm. 471 (1899).

³² 173 U. S. 301, 19 Supm. 471 (1899). It was here assumed that the provision in question was "not in itself unreasonable; that is, it has appropriate relation to the public convenience, does not go beyond the necessities of the case and is not directed against interstate commerce."

§ 61. Transportation into, and transportation out of, State.

Although the question of the validity of restrictions imposed under authority of a State more frequently arises with reference to transportation out of the State, it seems clear enough that, so far as concerns such question, there is no substantial distinction between transportation into, and transportation out of, the State, whether of property³³ or of persons.³⁴

§ 62. Character of person engaged in transportation; whether resident or nonresident of State.

For the purpose of determining the validity of a restriction upon transportation imposed under the authority of a State, presently to be considered, it seems immaterial whether such restriction be imposed upon a resident or upon a nonresident of the State.³⁵

³³ See *McNaughton v. McGirl*, 20 Mont. 124, 49 Pac. 651, 38 L. R. A. 367, 63 Am. St. Rep. 610 (1897); *Bennett v. American Express Co.*, 83 Me. 236, 22 Atl. 159, 13 L. R. A. 33, 23 Am. St. Rep. 774 (1891); *State v. Indiana & Ohio Oil, etc., Co.*, 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579 (1889); *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 155 Ind. 545, 58 N. E. 706, 53 L. R. A. 134 (1900); *Jackson Mining Co. v. Auditor-General*, 32 Mich. 488 (1875); *State v. Fitzpatrick*, 16 R. I. 54, 11 Atl. 767 (1888).

³⁴ *Crandall v. State of Nevada*, 6 Wall. 35, 18 L. ed. 745 (Dec. 1867), reversing 1 Nev. 294 (1865); *People v. Raymond*, 34 Cal. 492 (1868).

³⁵ In *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Supm. 592, 30 L. ed. 694 (1887), the persons upon whom the restriction was held invalidly imposed were citizens and residents of another State. But in *Stockard v. Morgan*, 185 U. S. 27, 22 Supm. 576, 46 L. ed. 785 (1902), where the restriction was upon residents, it was regarded as of no importance that in *Robbins v. Shelby County Taxing District* "the individual taxed resided outside of the State." See also *Minnesota v. Barber*, 136 U. S. 313, 326, 10 Supm. 862, 866, 34 L. ed. 455 (1890); *Commonwealth v. Rearick*, 26 Pa. Super. 384 (1904).

§ 63. The same; whether individual or corporation.

We shall hereafter consider the question of the power of a State to authorize the establishment and maintenance of means of transportation within the scope of the commerce clause, thus by a domestic or foreign corporation.³⁶ But we here assume, in accordance with the accepted view, that the State has such power. In this view it seems to reasonably follow, as it seems to be the established rule, that for the purpose of determining the validity of a restriction upon transportation imposed under the authority of a State, it is immaterial whether it be imposed upon a mere individual,³⁷ a corporation (at any rate if a *foreign* corporation³⁸), or an unincorporated association.³⁹ This proposition is abundantly illustrated in the decisions.

§ 64. Transportation by domestic corporation.

Inasmuch as, but for the authority conferred by the State, a domestic corporation would be without right

³⁶ See § 80.

³⁷ As to right of individuals to engage in transportation within the scope of the commerce clause, see *Crutcher v. Kentucky*, *infra*.

³⁸ As to domestic corporations, see § 64; foreign, § 65.

³⁹ See *Crutcher v. Kentucky*, 141 U. S. 47, 11 Supm. 851, 35 L. ed. 649 (1891); *Greek-American Sponge Co. v. Richardson Drug Co.*, 124 Wis. 469, 102 N. W. 888, 109 Am. St. Rep. 961 (1905).

It was intimated in *New York State v. Roberts*, 171 U. S. 658, 665, 19 Supm. 58, 61, 43 L. ed. 323 (1898), that there is a distinction, so far at least as concerns the power of a State to tax, "between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business." The same distinction was asserted in *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. 239, 55 C. C. A. 93 (6th C. 1902). The basis of this distinction seems not clear, and it has thus far received little consideration.

to engage in transportation at all,⁴⁰ whether within or without the scope of the commerce clause, it seems anomalous that it should be beyond the power of the State to impose restrictions upon transportation as engaged in by such a corporation, even when within the scope of the commerce clause.⁴¹ It has been pertinently said: "Certainly a State cannot be compelled to create corporations in aid of, or to facilitate commerce between the States; but if it does create one capable of engaging in such commerce and the corporation in fact so engages, is that an emancipation of the corporation from the control of the State?"⁴² We submit that on principle the answer should be in the negative, but the rule seems to have been firmly established to the contrary,⁴³ though, as it seems to us, without sufficient consideration.

⁴⁰ That is, as a corporation. It does not follow that the members of the corporation are without such right, considered as individuals. See *Crutcher v. Kentucky*, 141 U. S. 47, 11 Supm. 851, 35 L. ed. 649 (1891).

⁴¹ See dissenting opinion in *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, *infra* (118 U. S. 587, 7 Supm. 18). As to whether it makes any difference that such restriction is in the charter instead of in general legislation, see §§ 67, 114.

⁴² *State v. C., N. O. & T. P. Ry. Co.*, 47 Ohio St. 130, 23 N. E. 928, 7 L. R. A. 319 (1890). Here, in sustaining *quo warranto* proceedings against a domestic corporation on account of discrimination in interstate transportation, it was said: "As the State was not bound to create it in the first place, it is not bound to maintain it after having done so, if it violates the laws or public policy of the State or misuses its franchises to oppress the citizens thereof." As to application to domestic corporation, of rule forbidding limitation of liability as carrier, see *St. Joseph & Grand Island R. R. Co. v. Palmer*, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335 (1893).

⁴³ The proposition will find abundant illustration, but reference may be made here to two conspicuous illustrations. In *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U. S. 557, 7 Supm. 4,

§ 65. Transportation by foreign corporation.

As it is for the State to determine whether a corporation shall be allowed to exist as a domestic corporation, so, as a rule, it is for it to determine whether a foreign corporation may transact business therein. If, as just contended, it is not beyond the power of the State to impose restrictions upon transportation, whether within or without the scope of the commerce clause, as engaged in by a *domestic* corporation, it seems to us a reasonable conclusion that likewise it is not beyond its power to impose such restrictions upon such transportation, as engaged in by a *foreign* corporation. It seems to us that the contrary conclusion may rest on a failure to distinguish between what may be conceded to be the right to engage in such transportation *as a mere individual* and the right to engage therein *as a corporation*, whether domestic or foreign. But any discussion of the question seems purely academic, such contrary conclusion being so firmly estab-

30 L. ed. 244 (1886), reversing 105 Ill. 236 (1883), previous decision in 104 Ill. 476 (1882), it was as to a *domestic* railroad corporation that there was held invalid the regulation of rates of transportation under State authority. See § 67. So in *State v. Cumberland & P. R. R. Co.*, 66 Atl. 458 (Ct. App. Md. 1907), notwithstanding reservation of power to alter or repeal charter, and though such fixing of rates was by way of imposition of condition of allowing charter to continue in force. See as to effect of restrictions in charter, Prentice & Egan's Commerce Clause, p. 298. So in *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Supm. 1118, 30 L. ed. 1200 (1887), of taxation of gross receipts of a domestic corporation. See § 114.

In accordance with what we regard as the sounder view, the regulation of rates chargeable by a domestic corporation was sustained in *Camden & Amboy R. R. Co. v. Briggs*, 22 N. J. Law, 623, 651 (1850); so in *Raritan & Delaware Bay R. R. Co. v. Delaware & Raritan Canal, etc., R. R. Co.*, 18 N. J. Eq. 546 (1867), of a requirement of payment by such a corporation of a specified sum for each passenger carried across the State. See *State v. Underground Cable Co.*, 18 Atl. 581 (Ct. Ch. N. J., 1889).

lished. That is to say, notwithstanding the well-established power of a State to, as a rule, impose restrictions even to the extent of prohibition upon the transaction of business therein by a foreign corporation,⁴⁴

⁴⁴ *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357 (Dec. 1868); *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972 (Dec. 1870); *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 19 L. ed. 1029 (Dec. 1870); *Philadelphia Fire Assoc. v. New York*, 119 U. S. 110, 7 Supm. 108, 30 L. ed. 342 (1886); *Pembina Consolidated Silver Mining, etc., Co. v. Pennsylvania*, 125 U. S. 181, 8 Supm. 737, 31 L. ed. 650 (1888); *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 12 Supm. 403, 36 L. ed. 164 (1892); *Hooper v. California*, 155 U. S. 648, 15 Supm. 207, 39 L. ed. 297 (1895); *New York State v. Roberts*, 171 U. S. 658, 19 Supm. 58, 43 L. ed. 323 (1898); *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Supm. 281, 43 L. ed. 552 (1899); *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Supm. 518, 44 L. ed. 657 (1900), affirming 19 Tex. Civ. App. 1, 44 S. W. 936 (1898); *Nutting v. Massachusetts*, 183 U. S. 553, 22 Supm. 238, 46 L. ed. 324 (1902); *Cable v. U. S. Life Ins. Co.*, 191 U. S. 288, 24 Supm. 74, 48 L. ed. 188 (1903); *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, 26 Supm. 619, 50 L. ed. 1013 (1906). See also *Cooper Manuf. Co. v. Ferguson*, 113 U. S. 727, 5 Supm. 739, 28 L. ed. 1137 (1885); *Crutcher v. Kentucky*, 141 U. S. 47, 11 Supm. 851, 35 L. ed. 649 (1891); *Allgeyer v. Louisiana*, 165 U. S. 578, 583, 17 Supm. 427, 429, 41 L. ed. 832 (1897); article in 5 Mich. Law Rev. 250 (1907), by F. E. Robson.

See as to right of State to determine on what conditions its laws as to the consolidation of corporations may be availed of, *Ashley v. Ryan*, 153 U. S. 436, 14 Supm. 865, 38 L. ed. 773 (1894), affirming 49 Ohio St. 504, 31 N. E. 721 (1892); *Chicago & Eastern Illinois R. R. Co. v. State*, 153 Ind. 134, 51 N. E. 924 (1899). As to requirement that foreign become a domestic corporation in order to operate a railroad, see *Commonwealth v. Mobile & O. R. R. Co.*, 64 S. W. 451, 54 L. R. A. 916 (Ct. App. Ky., 1901); imposition of duty upon mortgagee to enter satisfaction of mortgage, *Dittman Boot & Shoe Co. v. Mixon*, 120 Ala. 206, 24 So. 847 (Nov. T. 1897); requirement of deduction of tax upon payment of interest on bonds, *Commonwealth v. N. Y., L. E. & W. R. R. Co.*, 150 Pa. St. 234, 24 Atl. 609 (1892); *Commonwealth v. D. & H. Canal Co.*, 150 Pa. St. 245, 24 Atl. 599 (1892).

As to corporations of foreign countries engaged in commerce with such countries, see *Crutcher v. Kentucky*, 141 U. S. 47, 11 Supm. 851, 35 L. ed. 649 (1891).

such power does not include the imposition of a restriction upon transportation within the scope of the commerce clause.⁴⁵ Yet as to such a corporation there

⁴⁵ Thus, in *Norfolk & Western R. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Supm. 958, 34 L. ed. 394 (1890), reversing 114 Pa. St. 256, 6 Atl. 45 (1886), of the imposition of a license tax upon a railroad corporation, on account of having an office that was maintained solely because of the interstate business of the corporation. Applied under like conditions in *Clyde S.S. Co. v. City Council of Charleston*, 76 Fed. 46 (C. C. S. C., 1896), a case of a steamship corporation. To like effect, *Attorney-General v. Electric Storage Battery Co.*, 188 Mass. 239, 74 N. E. 467 (1905). See also *People ex rel. Pennsylvania R. R. Co. v. Wemple*, 138 N. Y. 1, 33 N. E. 720, 19 L. R. A. 694 (1893). But in *Western Union Tel. Co. v. Mississippi R. R. Comm.*, 74 Miss. 80, 21 So. 15 (1896), a telegraph company, which so far as appears was engaged in domestic as well as interstate transmission of messages, was held subject to a requirement that it maintain offices in the State, notwithstanding the objection that it was a foreign corporation and had obtained its right to erect lines along post roads under an act of Congress.

The following are decisions in which was applied or recognized the doctrine of the invalidity of restrictions upon transportation within the scope of the commerce clause engaged in by a foreign corporation.

Federal.—*New Orleans & Memphis Packet Co. v. James*, 32 Fed. 21 (C. C. La., 1887); *Wells, Fargo & Co. v. Northern Pac. Ry. Co.*, 23 Fed. 469, 476 (C. C. Oreg., 1884); *U. S. Rubber Co. v. Butler Shoe Co.*, 132 Fed. 398 (C. C. Colo., 1904); affirmed in *Butler Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1 (C. C. A. 8th C. 1907).

Alabama.—*Ware v. Hamilton-Brown Shoe Co.*, 92 Ala. 145, 9 So. 136 (Nov. T. 1890); *Cook v. Rome Brick Co.*, 98 Ala. 409, 12 So. 918 (Nov. T. 1892-93); *Culberson v. American Trust & Banking Co.*, 107 Ala. 457, 19 So. 34 (Nov. T. 1894). See, however, *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90 (Dec. T. 1880).

Arkansas.—*Gunn v. White Sewing Machine Co.*, 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223 (1892).

Colorado.—*Kindel v. Beck & Pauli Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311 (1893); *Fairbanks v. Macleod*, 8 Colo. App. 190, 45 Pac. 282 (1896).

seems to be no valid objection to the imposition by the State of a condition precedent to the right to

Idaho.—*Belle City Manuf. Co. v. Frizzell*, 11 Idaho, 1, 81 Pac. 58 (1905).

Illinois.—*Havens & Geddes Co. v. Diamond*, 93 Ill. App. 557 (1901).

Iowa.—See *Goodrel v. Kreichbaum*, 70 Iowa, 362, 30 N. W. 872 (1886).

Kansas.—See *John Deere Plow Co. v. Wyland*, *infra*, in connection with *State v. American Book Co.*, 65 Kan. 847, 69 Pac. 563 (1902), where a corporation, though engaged in interstate trade, was held subject to "such reasonable conditions as the filing of its charter, the payment of charter fees, the making of reports and furnishing of information concerning its business, the appointment of agents to receive service of process," etc.

Kentucky.—*Commonwealth v. Hogan*, 74 S. W. 737 (Ct. App. Ky., 1903); *Ryman Steamboat Line Co. v. Commonwealth*, 101 S. W. 403, 10 L. R. A. N. S. 1187 (Ct. App. Ky., 1907).

Michigan.—*Coit v. Sutton*, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819 (1894); *Wilcox Cordage & Supply Co. v. Mosher*, 114 Mich. 64, 72 N. W. 117 (1897). But see *Moline Plow Co. v. Wilkinson*, 105 Mich. 57, 62 N. W. 1119 (1895).

Montana.—*McNaughton v. McGirl*, 20 Mont. 124, 49 Pac. 651, 38 L. R. A. 367, 63 Am. St. Rep. 610 (1897).

New Mexico.—*Singer Manuf. Co. v. Hardee*, 4 N. M. 676, 16 Pac. 605 (1888).

New York.—*Murphy Varnish Co. v. Connell*, 10 Misc. 553, 32 N. Y. Suppl. 492 (Supm. Ct. Onondaga Circuit, 1894).

Ohio.—*Haldy v. Tomoor-Haldy Co.*, 4 Ohio Dec. 118 (1896).

Pennsylvania.—*Mearshon v. Pottsville Lumber Co.*, 187 Pa. St. 12, 40 Atl. 1019, 67 Am. St. Rep. 560 (1898).

Tennessee.—*Milan Milling, etc., Co. v. Gorten*, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135 (1894).

Texas.—*Allen v. Tyson-Jones Buggy Co.*, 91 Tex. 22, 40 S. W. 393 (1897); *Miller v. Goodman*, 91 Tex. 41, 40 S. W. 718 (1897); *Bateman v. Western Star Milling Co.*, 1 Tex. Civ. App. 90, 20 S. W. 931 (1892); *Reed v. Walker*, 2 Tex. Civ. App. 92, 21 S. W. 687 (1893); *Gale Manuf. Co. v. Finkelstein*, 22 Tex. Civ. App. 241, 54 S. W. 619 (1899); *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554, 80 N. W. 857 (1904).

maintain proceedings in the courts of the State.⁴⁶ The question whether the business transacted by such a corporation is within the scope of the commerce clause seems, generally speaking, "one of fact to be determined by the proper tribunal."⁴⁷

§ 66. Power of eminent domain.

The doctrine that no restriction may be validly imposed under the authority of a State upon transportation within the scope of the commerce clause, seems to suggest the conclusion that there may not be thus imposed a restriction upon the exercise of the power of eminent domain, in so far as necessary for the purposes of such transportation, thus by railroad.⁴⁸ But

⁴⁶ Thus, in *Iowa Falls Manuf. Co. v. Farrar*, 19 S. D. 632, 104 N. W. 449 (1905), was sustained requirement that articles be filed and resident agent appointed. To like effect, *John Deere Plow Co. v. Wyland*, 69 Kan. 255, 76 Pac. 863 (1904). Compare *Texas & Pacific Ry. Co. v. Davis*, 93 Tex. 378, 55 S. W. 562 (1900). But see *Brin v. Wachusett Shirt Co.*, 43 S. W. 295 (Tex. Civ. App. 1897). See also *Allen v. Tyson-Jones Buggy Co.*, 91 Tex. 22, 40 S. W. 393 (1897); *Lasater v. Purcell Mill & Elevator Co.*, 22 Tex. Civ. App. 33, 54 S. W. 425 (1899).

But it would seem that such a condition may not be imposed as a condition precedent to the right to maintain proceedings in the Federal courts. See *Butler Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1 (C. C. A. 8th C. 1907.)

⁴⁷ *Commonwealth v. Read Phosphate Co.*, 113 Ky. 32, 67 S. W. 45 (1902). See *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. 239, 55 C. C. A. 93 (6th C. 1902); *Hastings Industrial Co. v. Moran*, 143 Mich. 679, 107 N. W. 706 (1906).

⁴⁸ Compare as to power of United States to exercise the power even against the consent of a State, as an incident of "the powers vested by the Constitution in the general government," *Kohl v. U. S.*, 91 U. S. 367, 23 L. ed. 449 (Oct. 1875). So by corporation authorized by Congress, *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 656, 10 Supm. 965, 970, 34 L. ed. 295 (1890).

this view has not yet been established, and however sound on principle it seems unlikely that it will be.⁴⁹ The general rule that the consent of the State is essential to the exercise of such power, thus by a foreign corporation, has commonly been applied without reference to whether the purposes of such corporation in-

⁴⁹ Perhaps, however, an opening wedge for such a doctrine is to be found in that class of decisions already considered (see § 24), holding it beyond the power of the State to impose restrictions on account of *means or instruments* by which transportation within the scope of the commerce clause may be carried on. It was so held, for instance, as to *maintaining an office*, in *Norfolk & Western R. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Supm. 958, 34 L. ed. 394 (1890). In *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. ed. 708 (Oct. 1877), it was regarded as unnecessary to decide whether a corporation deriving authority under an act of Congress to engage in transportation within the scope of the commerce clause, would have such power. To like effect, *Western Union Tel. Co. v. Ann Arbor R. R. Co.*, 178 U. S. 239, 20 Supm. 867, 44 L. ed. 1052 (1900), reversing 90 Fed. 379, 33 C. C. A. 1103 (6th C. 1898); *Western Union Tel. Co. v. Pennsylvania R. R. Co.*, 195 U. S. 540, 25 Supm. 133, 49 L. ed. 312 (1904), affirming 123 Fed. 33, 59 C. C. A. 113 (3d C. 1903); which affirmed 120 Fed. 362 (C. C. Pa., 1903), and reversed 120 Fed. 981 (C. C. N. J., 1903).

See also *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Supm. 485, 37 L. ed. 380 (1893); *Mercantile Trust Co. v. Atlantic & P. R. R. Co.*, 63 Fed. 513 (C. C. Cal., 1894); *Postal Tel. Cable Co. v. Southern Ry. Co.*, 89 Fed. 190 (C. C. N. C., 1898); *Postal Tel. Cable Co. v. Cleveland, C., C. & St. L. Ry. Co.*, 94 Fed. 234 (C. C. Ohio, 1899); *City of Toledo v. Western Union Tel. Co.*, 107 Fed. 10, 46 C. C. A. 111 (6th C. 1901); *Northwestern Telephone Exchange Co. v. Chicago, Milwaukee, etc., Ry. Co.*, 76 Minn. 334, 79 N. W. 315 (1899); *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868 (1902).

In *Raritan & Delaware Bay R. R. Co. v. Delaware & Raritan Canal, etc., R. R. Co.*, 18 N. J. Eq. 546, 560 (1867), was sustained a provision that it should not be lawful without the consent of certain railroad corporations to construct within a specified period any railroad intended or used for transportation between New York and Philadelphia.

clude transportation within the scope of the commerce clause.⁵⁰ In this view it is yet within the power of the States to in effect largely regulate such transportation even to the extent of prohibition.

§ 67. Regulation of rates of transportation.

As to transportation within the scope of the commerce clause it is established that it is beyond the power of the States to regulate the rate thereof,⁵¹ even

⁵⁰ See, for instance, *Evansville & Henderson Traction Co. v. Henderson Bridge Co.*, 141 Fed. 51, 72 C. C. A. 539 (6th C. 1905). So a *fortiori* as to a domestic corporation. See, for instance, *Northwestern Tel. Exchange Co. v. City of St. Charles*, 154 Fed. 386 (C. C. Minn., 1907).

⁵¹ Thus, in *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U. S. 557, 7 Supm. 4, 30 L. ed. 244 (1886), reversing 105 Ill. 236 (1883), previous decision in 104 Ill. 476 (1882), was held invalid, an Illinois statute prohibiting discrimination by a railroad corporation in charges, as applied to a contract for continuous transportation from Illinois into another State. So in *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 213, 14 Supm. 1087, 1090, 38 L. ed. 962 (1894), reversing 22 S. W. 851 (Ct. App. Ky., 1893), previous decision in *Commonwealth v. Covington & C. Bridge Co.*, 21 S. W. 1042 (Ct. App. Ky., 1893), of a Kentucky statute limiting the charges for passage over a bridge spanning the Ohio River and connecting Kentucky with Ohio. See, however, as to effect of reciprocal action of the two States.

For various instances of such regulation under State authority held invalid, see *Kaeiser v. Illinois Cent. R. R. Co.*, 18 Fed. 150 (C. C. Iowa, 1883); *Louisville & N. R. R. Co. v. R. R. Comm. of Tennessee*, 19 Fed. 679 (C. C. Tenn., 1884); *Mobile & O. R. R. Co. v. Sessions*, 28 Fed. 592 (C. C. Miss., 1886); *Baird v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 592 (C. C. Ark., 1890); *Rosenbaum Grain Co. v. Chicago, R. I. & T. Ry. Co.*, 130 Fed. 46 (C. C. Tex., 1903); *Mobile & Ohio R. R. Co. v. Dismukes*, 94 Ala. 131, 10 So. 289, 17 L. R. A. 113 (Nov. T. 1891); *Kansas City Southern Ry. Co. v. Brooks*, 105 S. W. 93 (Supm. Ct. Ark., 1907); *Carton v. Illinois Central R. R. Co.*, 59 Iowa, 148, 13 N. W. 67, 44 Am. Rep. 672 (1882); *State v. Chicago & Northwestern Ry. Co.*, 70 Iowa, 162, 30 N. W. 398 (1886); *Hardy v. Atchison, Topeka & Santa Fe R. R. Co.*, 32 Kan. 698, 5 Pac. 6 (1884; see as to effect of act of

as to transportation over that portion of the route that is wholly within the State.⁵² This seems, generally

Congress of 1866); *Commonwealth v. Housatonic R. R. Co.*, 143 Mass. 264, 9 N. E. 547 (1887); *McLean v. Charlotte, Columbia, etc., R. R. Co.*, 96 N. C. 1, 4 S. E. 760 (1887); *Winton v. Pennsylvania R. R. Co.*, 20 Phila. (Pa.) 184 (1890); *Railroad Commrs. v. R. R. Co.*, 22 S. C. 220 (1885); *Southern Pac. Ry. Co. v. Haas*, 17 S. W. 600 (Supm. Ct. Tex., 1891); *Southern Express Co. v. Goldberg*, 101 Va. 619, 44 S. E. 893, 62 L. R. A. 669 (1903); *Jennings v. Big Sandy & C. R. R. Co.*, 57 S. E. 272 (Supm. Ct. App. W. Va., 1907).

See, generally, *Cotting v. Kansas City Stock-Yards Co.*, 82 Fed. 850 (C. C. Kan., 1897); *Sheldon v. Wabash R. R. Co.*, 105 Fed. 785 (C. C. Ill., 1900); *Merrill v. Boston & Lowell R. R.*, 63 N. H. 259 (1884); *Texas & Pacific Ry. Co. v. Clark*, 4 Tex. Civ. App. 611, 23 S. W. 698 (1893); *Wright v. Howe*, 21 S. W. 314 (Tex. Civ. App. 1893); article in 9 Harv. Law Rev. 324 (1895), by W. F. Dana.

On this point seems overruled *Providence Coal Co. v. Providence & Worcester R. R. Co.*, 15 R. I. 303, 4 Atl. 394 (1886).

In *Louisville & Nashville R. R. Co. v. Eubank*, 184 U. S. 27, 22 Supm. 277, 46 L. ed. 416 (1902), was held invalid the prohibition of Ky. Const., § 218 (as construed by the State court), against a charge for carriage between points in the State, for a shorter than for a longer distance over the same line, even though such longer distance might be between a point within and one without the State. The court said (184 U. S. 43, 22 Supm. 283): "The direct effect of that provision is to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if so, it must give up its interstate business or else reduce

⁵² *Northern Pac. Ry. Co. v. Keyes*, 91 Fed. 47 (C. C. N. D., 1898); *Southern Express Co. v. Goldberg*, *supra*, both citing *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, *supra*.

To the contrary seems *Commissioner of Railroads v. Wabash R. R. Co.*, 126 Mich. 113, 85 N. W. 466 (1901), holding that in regulation of rates under authority of the State there might be included "the amount of interstate fares earned by that portion of the road lying within the State." But this decision seems based on a misapprehension of the effect of *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Supm. 593, 33 L. ed. 1025 (1890); *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Supm. 121, 163, 35 L. ed. 994 (1891). See § 73a.

speaking, a proper application of the doctrine of the exclusiveness of the power of Congress, but, so far as concerns transportation by *corporations*, what has just been said seems applicable here.⁵³

§ 68. Combinations among corporations; e. g., consolidation.

It being established then that it is beyond the power of the State to regulate the rate of transportation within the scope of the commerce clause, it would seem a reasonable conclusion that it is equally beyond its power to prohibit or otherwise regulate combina-

the local rate in proportion." See case distinguished (184 U. S. 41, 22 Supm. 282) of fixing local with reference to interstate rates prescribed by Congress; also (184 U. S. 42, 22 Supm. 282) of Congress making local the basis of interstate rates. But in *Louisville & Nashville R. R. Co. v. Kentucky*, 183 U. S. 503, 22 Supm. 95, 46 L. ed. 298 (1902), affirming 106 Ky. 633, 51 S. W. 164, 1012, 90 Am. St. Rep. 236 (1890), was sustained section 218 as applied to places all within the State.

In *N. Y. Cent. & H. R. R. Co. v. Chosen Freeholders*, 65 Atl. 860 (Supm. Ct. N. J., 1907), was held invalid regulation of rates on a ferry between New Jersey and New York, operated in connection with a railroad, for the transportation of passengers within the scope of the commerce clause. Some importance seems to have been attached to the circumstance that rates *into*, as well as *from*, the State were thus fixed. See as to effect of filing schedule of rates under Interstate Commerce Act. On this point *Chosen Freeholders of Hudson County v. State*, 24 N. J. Law, 718 (1853), affirming *State v. Freeholders of Hudson County*, 23 Id. 206 (1851), seems of doubtful authority. See also as to authority to fix such rates, *State v. Sickmann*, 65 Mo. App. 499 (1896). As to necessity that the reasonableness or unreasonableness of charges prescribed by a State for transportation between points within a State, be determined "without reference to the interstate business done by the carrier or to the profits derived therefrom," see § 23.

⁵³ It is not apparent that it makes any difference that the provision for regulation appears in the charter of a corporation, instead of in general legislation. See *State v. Cumberland & P. R. R. Co.*, 66 Atl. 458 (Ct. App. Md., 1907); also § 114.

tions among corporations, in so far as such combinations relate to such transportation, for instance, a consolidation of corporations operating parallel or competing lines. Nor does it seem to make any difference that one or all such corporations are domestic corporations, for as already seen, it is, at least under certain conditions, thus as to regulation of rates of transportation, beyond the power of the State to impose restrictions upon transportation as engaged in by domestic corporations, and this conclusion seems re-enforced by the establishment of the view that the power of Congress to regulate includes the power to prescribe "the rule of free competition," this having been conspicuously applied to combinations among corporations.⁵⁴ But this conclusion seems contrary to the established view that it is within the power of the State to regulate, even to the extent of prohibition, such combinations among corporations.⁵⁵

⁵⁴ See § 35.

⁵⁵ Thus, in *Louisville & Nashville R. R. Co. v. Kentucky*, 161 U. S. 677, 701, 16 Supm. 714, 723, 40 L. ed. 849 (1896), affirming 97 Ky. 675, 31 S. W. 476 (1895), a prohibition against the consolidation of parallel or competing railroad, etc., lines was sustained as applicable to a domestic corporation engaged in transportation within the scope of the commerce clause. To like effect, *State of Minnesota v. Northern Securities Co.*, 123 Fed. 692, 703 (C. C. Minn., 1903). See also *Von Steuben v. Central R. R. Co. of New Jersey*, 4 Pa. Dist. 153 (1895). So in *Gulf, Colorado & Santa Fe Ry. Co. v. State*, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815 (1888), a like prohibition was applied to an agreement among corporations, several of them domestic, the object being to fix rates for transportation so as to prevent competition. See as to effect of such prohibition as to foreign corporations.

Undoubtedly, however, there is no objection to State legislation authorizing the consolidation of corporations engaged in transportation within the scope of the commerce clause. See *Boardman v. Lake Shore & Michigan Southern Ry. Co.*, 84 N. Y. 157, 185 (1881); *Thoms v. Greenwood*, 6 Ohio Dec. (Reprint) 639, 664 (1878).

§ 69. Invalidity of restrictions imposed under authority of State.

It has been seen that the power of Congress is exclusive of any exercise of such power under authority of a State in matters that are "in their nature national or admit only of one uniform system or plan of regulation." We have suggested that such matters are to be identified with *transportation* within the scope of the commerce clause as heretofore defined. It follows, subject to limitations elsewhere considered, that *no restriction by way of prohibition or otherwise may be validly imposed under the authority of a State upon transportation within the scope of the commerce clause.* This general rule will hereafter be illustrated in detail.⁵⁶ Although this rule has been conspicuously applied to contracts of sale, it will of course be borne in mind that it is by no means confined to restrictions upon such contracts, being equally applicable, though the element of a sale or contract of sale may be absent.⁵⁷

⁵⁶ See, for instance, *City of Council Bluffs v. Kansas City, etc., R. R. Co.*, 45 Iowa, 338, 24 Am. Rep. 773 (1876).

⁵⁷ See §§ 9, 75.

A provision invalid within this rule may nevertheless be contained in the same statute with a separable and valid provision applicable to transactions not within the scope of the commerce clause, for instance, transportation between points in the same State. For instances of provisions general in terms sustained as applicable to transactions not within the scope of the commerce clause, see *Beardsley v. N. Y., Lake Erie & Western R. R. Co.*, 15 App. Div. 251, 44 N. Y. Suppl. 175 (1897); reversed on another ground in 162 N. Y. 230, 56 N. E. 488 (1900); *Dillon v. Erie R. R. Co.*, 19 Misc., 116, 43 N. Y. Suppl. 320 (App. T. 1897); *Rothermel v. Meyerle*, 136 Pa. St. 250, 20 Atl. 583, 9 L. R. A. 366 (1890); *Chicago, Burlington & Quincy R. R. Co. v. Jones*, 149 Ill. 361, 384, 37 N. E. 247, 253, 24 L. R. A. 141, 147, 41 Am. St. Rep. 278 (1894); *State v. Kibling*, 63 Vt. 636, 22 Atl. 613 (1891). Compare *Standard Oil Co. v. State*, 117 Tenn. 618, 100 S. W. 705, 711, 10 L. R. A. N. S. 1015, 1022 (1907). For instances of provisions held not separable for the purpose of

§ 70. Restriction by way of tax or other condition.

Restrictions invalidly imposed under the authority of a State, upon transportation within the scope of the commerce clause, have commonly been in the form of a condition, rather than absolute prohibition, thus, though by no means necessarily, by way of requirement of payment of a tax, commonly termed a "license"⁵⁸ or "privilege" tax.⁵⁹ As elsewhere more fully explained, such a tax is to be carefully distinguished from a mere tax not imposed as a *condition* of engaging in such transportation, though the distinction has not infrequently been overlooked. The rule here stated has found frequent application in holding invalid restrictions upon transportation, thus

application to such a transaction, see *Anderson v. Louisville & N. R. R. Co.*, 62 Fed. 46 (C. C. Ky., 1894); *State v. O'Connor*, 5 N. D. 629, 67 N. W. 824 (1896); *Galveston, H. & S. A. Ry. Co. v. Davidson*, 93 S. W. 436 (Tex. Civ. App. 1906); *Ex parte Massey*, 92 S. W. 1086 (Tex. Crim. App. 1906).

That, however, a statute in general prohibition of sales of liquor is not invalid because of failure to expressly except interstate sales to which it cannot validly apply, see *Commonwealth v. Gagne*, 153 Mass. 205, 26 N. E. 449, 10 L. R. A. 442 (1891); *State v. Amery*, 12 R. I. 64 (1878). Compare *Commonwealth v. Clapp*, 5 Gray (Mass.), 97 (1855).

Compare as to provision for regulation by Congress being invalidated by inclusion of provision for regulation of commerce wholly within State, § 39.

⁵⁸ In *Lumberville Bridge Co. v. State Board of Assessors*, 55 N. J. Law, 529, 26 Atl. 711, 25 L. R. A. 134 (1893), was sustained a "license fee or tax" upon a domestic corporation wholly engaged, so far as appears, in interstate commerce, that is, transportation across a bridge into another State. See *Honduras Commercial Co. v. State Board of Assessors*, 54 N. J. Law, 278, 23 Atl. 668 (1892).

⁵⁹ That a tax, though termed a "privilege tax," is not necessarily an invalid restriction upon commerce within the scope of the commerce clause, see *Oliver Finney Grocery Co. v. Speed*, 87 Fed. 408 (C. C. Tenn., 1898).

by railroad⁶⁰ or express;⁶¹ so of transmission of intelligence by telegraph.⁶²

⁶⁰ Thus in *McCall v. California*, 136 U. S. 104, 10 Supm. 881, 34 L. ed. 391 (1890), of an ordinance imposing a license tax as a condition of transacting the business of soliciting passengers to travel over a railroad engaged in transportation outside of the State.

For other instances see *Southern Ry. Co. v. City of Asheville*, 69 Fed. 359 (C. C. N. C., 1895); *City of San Bernardino v. Southern Pacific Co.*, 107 Cal. 524, 40 Pac. 796, 29 L. R. A. 327 (1895). See as to effect of municipality being located on branch line); *People ex rel. Pennsylvania R. R. Co. v. Wemple*, 138 N. Y. 1, 33 N. E. 720, 19 L. R. A. 694 (1893).

As overruled must be regarded *Lightburne v. Taxing District*, 4 Lea (Tenn.), 219 (1880).

So has been held invalidly imposed a "privilege tax" upon a sleeping car company. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 6 Supm. 635, 29 L. ed. 785 (1886), overruling *Pullman Southern Car Co. v. Gaines*, 3 Tenn. Ch. 587 (1877). See previous decision in *Pullman Southern Car Co. v. Nolan*, 22 Fed. 276 (C. C. Tenn., 1884); s. p., *Tennessee v. Pullman Southern Car Co.*, 117 U. S. 51, 6 Supm. 643, 29 L. ed. 791 (1886). See also *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 11 Supm. 682, 35 L. ed. 303 (1891). To similar effect, *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 24 Supm. 39, 48 L. ed. 134 (1903), where the statute imposing the tax in general terms was held not severable for the purpose of limitation to intrastate business. See *Gibson County v. Pullman South. Car Co.*, 42 Fed. 572 (C. C. Tenn., 1890).

⁶¹ Thus in *Crutcher v. Kentucky*, 141 U. S. 47, 11 Supm. 851, 35 L. ed. 649 (1891), reversing 89 Ky. 6, 12 S. W. 141 (1889), of statute forbidding under criminal liability any agent of a foreign express company to carry on the business of transportation in the State without first obtaining a license, as applied to a corpora-

⁶² Thus in *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Supm. 1380, 32 L. ed. 311 (1888), reversing *Port of Mobile v. Leloup*, 76 Ala. 401 (Dec. T. 1884), of an ordinance imposing a license tax. Though a portion of the business was purely intrastate, the tax affected the whole business without discrimination. See also *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Supm. 817, 47 L. ed. 995 (1903).

§ 71. The same; restriction upon transportation of persons; immigration.

Although the rule just stated has been more frequently applied to transportation of property, it applies as well to invalidate restrictions upon transportation of persons,⁶³ thus conspicuously restrictions

tion doing both an interstate and an intrastate business. Such statute also required such company to have a capital stock of at least \$150,000. It was held to make no difference that the company incidentally did an intrastate business. For other instances see *U. S. Express Co. v. Hemmingway*, 39 Fed. 60 (C. C. Miss., 1889); *U. S. Exp. Co. v. Allen*, 39 Fed. 712 (C. C. Tenn., 1889); reversed on another ground in *Shelton v. Platt*, 139 U. S. 591, 11 Supm. 646, 35 L. ed. 273 (1891); *Webster v. Bell*, 68 Fed. 183, 15 C. C. A. 360 (4th C. 1895); *Southern Exp. Co. v. Mayor, etc., of Ensley*, 116 Fed. 756 (C. C. Ala., 1902); *Commonwealth v. Smith*, 92 Ky. 38, 17 S. W. 187, 36 Am. St. Rep. 578 (1891). To like effect with *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 24 Supm. 39, 48 L. ed. 134 (note 60, *supra*), see *State v. Northern Pacific Express Co.*, 27 Mont. 419, 71 Pac. 404, 94 Am. St. Rep. 824 (1903). See also *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, 218, 17 Supm. 604, 605, 47 L. ed. 965 (1897).

On this point must be regarded as overruled *Osborne v. Mobile*, 16 Wall. 479, 21 L. ed. 470 (Dec. 1872), affirming 44 Ala. 493 (1870). The ordinance here in question was sustained in *Southern Express Co. v. Mayor, etc., of Mobile*, 49 Ala. 404 (1873). Also overruled is *Memphis & Little Rock R. R. Co. v. Nolan*, 14 Fed. 532 (C. C. Tenn., 1882).

⁶³ Thus in *Crandall v. State of Nevada*, 6 Wall. 35, 18 L. ed. 745 (Dec. 1867), reversing 1 Nev. 294 (1865), of a Nevada statute imposing "a capitation tax of one dollar upon every person leaving the State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire." The decision was not, however, based on the commerce clause, but on the effect of such statute on the functions of the Federal government. Followed under like conditions in *Clarke v. Philadelphia, Wilmington, etc., R. R. Co.*, 4 Houst. (Del.) 158 (1870). See *State v. Fullerton*, 7 Rob. (La.) 210 (1844). So in *People v. Raymond*, 34 Cal. 492 (1868), here applying the commerce clause, of a statute imposing a tax on contracts for passage on vessels to ports outside the State. Here, however, Congress

upon transportation into a State of immigrants from a foreign country.⁶⁴

had legislated on the same subject. See *Garrison v. Tillinghast*, 18 Cal. 404 (1861). So in *City of Bangor v. Smith*, 83 Me. 422, 22 Atl. 379, 13 L. R. A. 686 (1891), of a statute requiring a carrier bringing into the State a person not having a settlement therein, to remove him beyond the State, "if he falls into distress within a year."

In *Holyoke & South Hadley Falls Ice Co. v. Ambden*, 55 Fed. 593, 21 L. R. A. 319 (C. C. Mass., 1893), service of process from a State court was held not invalidated because of the person served traveling at the time through the State.

As, however, to restrictions in exercise of police power, see § 89.

As already stated (see § 11) the application of the commerce clause to conditions of slavery is now of little or no practical importance. See *Gibbons v. Ogden*, 9 Wheat. 1, 206, 6 L. ed. 23 (1824); *Groves v. Slaughter*, 15 Pet. 449, 10 L. ed. 800 (Jan. T. 1841); *Osborn v. Nicholson*, 1 Dill. 219, 18 Fed. Cas. No. 10,595 (1870); *Commonwealth v. Griffin*, 3 B. Mon. (Ky.) 208 (1842); *Lemmon v. People*, 20 N. Y. 562, 611 (1860), affirming 26 Barb. 270 (1857); *Barker v. Wise*, 16 Gratt. (Va.) 139, 195 (1861).

As to provision for seizure and imprisonment of free negroes brought into State, see *Elkison v. Delieesseline*, Brunner Col. Cas. 431, 8 Fed. Cas. No. 4,366 (1823); *The Cynosure*, 1 Spr. 88, 6 Fed. Cas. No. 3,529 (1844); *The William Jarvis*, 1 Spr. 485, 29 Fed. Cas. No. 17,697 (1859); *South Carolina Police Bill*, 1 Op. Atty.-Gen. 659 (1824); 2 Id. 426 (1831).

⁶⁴ Thus in *Passenger Cases (Smith v. Turner)*, 7 How. 283, 12 L. ed. 702 (Jan. T. 1849), of a New York statute requiring payment of a specified sum by the master of every vessel arriving in the port of New York from a foreign port, for each steerage passenger. See *People v. Brooks*, 4 Den. (N. Y.) 469 (1847); *Smith v. Marston*, 5 Tex. 426 (1849). So, reversing *Norris v. City of Boston*, 4 Metc. (Mass.) 282 (1842), of a Massachusetts statute requiring payment of a specified sum for each alien passenger (other than those belonging to classes specified, such as lunatics and paupers) landing from a vessel arriving at any port or harbor within the State, from any port or place without the same. Followed under like conditions in *People v. Downer*, 7 Cal. 169 (1857). So in *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 23 L. ed. 543 (Oct. 1875), of a New York statute requiring the owner of a vessel arriving at the port of New York from a foreign port to give a bond for every passenger not a citizen of the United States in the penalty of \$300, conditioned to indemnify against

§ 72. The same; restriction upon navigation; vessels enrolled and licensed under authority of Congress.

The rule just stated applies not only to restrictions upon transportation by land, but to transportation for the relief or support of such person for four years; it being, however, provided that, instead of giving such a bond, such owner might pay for each passenger, within twenty-four hours after his landing, the sum of \$1.50. See *Mayor, etc., of N. Y. v. Staples*, 6 Cow. (N. Y.) 169 (1826); *Candler v. Mayor, etc., of N. Y.*, 1 Wend. (N. Y.) 493 (1828). Here was overruled *Commissioners of Immigration v. Brandt*, 26 La. Ann. 29 (1874), involving the effect of like Louisiana legislation. So in *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550 (Oct. 1875), of a California statute enabling a specified officer to satisfy himself whether any passenger not a citizen of the United States, arriving in the State by vessel from a foreign port, belonged to any of enumerated classes (such as lunatics, paupers, etc.), including "lewd and debauched women." As to such class was required a bond like that in *Henderson v. Mayor*; instead thereof payment to be of such a sum as such officer "might in each case think proper to exact," he to retain a percentage thereof for his services, the balance to be devoted generally to the use of the indigent citizens of the State. Such officer was besides allowed to impose other charges. The manifest purpose of such statute was declared to be "not to obtain indemnity, but money." See *Re Ah Fong*, 3 Sawy. 144, 1 Fed. Cas. No. 102 (1874), decided on the same state of facts. In *State v. Steamship Constitution*, 42 Cal. 578, 10 Am. Rep. 303 (1872), California legislation on this subject had been held unconstitutional. See also *Lin Sing v. Washburn*, 20 Cal. 534 (1862); *Ex parte Ah Cue*, 101 Cal. 197, 35 Pac. 556 (1894). So in *People v. Compagnie Générale Transatlantique*, 107 U. S. 59, 2 Supm. 87, 27 L. ed. 383 (1883), affirming 10 Fed. 357 (C. C. N. Y. 1882), was held invalid a New York statute imposing a duty on every alien passenger coming by vessel from a foreign port to the port of New York. See as to effect of act of Congress of August 3, 1882, imposing a duty on immigrants. So held against the contention that such statute was in aid of the inspection laws of the State. Followed under like conditions in *People ex rel. Bunker v. Pacific Mail S. S. Co.*, 16 Fed. 344 (C. C. Cal., 1883). See *People v. Edye*, 11 Daly (N. Y.), 132 (1882).

As to legislation by Congress on this subject, see § 34.

As to restrictions upon immigration in exercise of "police power," see § 89.

tion by water, that is navigation,⁶⁵ to which, as already stated, the commerce clause was first conspicuously applied. It has been frequently applied to restrictions upon navigation by vessels enrolled and licensed under the authority of Congress,⁶⁶ but, so far, at

⁶⁵ Thus held invalid the imposition of a toll for the use of a river in floating lumber. *Carson River Lumbering Co. v. Patterson*, 33 Cal. 334 (1867).

⁶⁶ Thus notably in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23 (1824), reversing 17 Johns. (N. Y.) 488 (1820), which affirmed *Ogden v. Gibbons*, 4 Johns. Ch. 150 (1819). The importance of this decision seems to us, as already stated, to have been vastly and injuriously exaggerated. See § 53.

What was actually decided was merely the invalidity of State legislation as in conflict with legislation by Congress authorizing such enrollment and license. See subsequent decisions in same matter in *North River Steam Boat Co. v. Livingston*, Hopk. Ch. (N. Y.) 149 (1824), 3 Cow. (N. Y.) 713 (1825). For other decisions, see *Livingston v. Van Ingen*, 9 Johns. (N. Y.) 507 (1812); *Livingston v. Ogden*, 4 Johns. Ch. (N. Y.) 48 (1819); *North River Steam Boat Co. v. Hoffman*, 5 Johns. Ch. (N. Y.) 300 (1821); *Gibbons v. Livingston*, 6 N. J. Law, 236 (1822). See introduction to Cotton's Constitutional Decisions of John Marshall.

So in *Sinnot v. Davenport*, 22 How. 227, 16 L. ed. 243 (Dec. 1859), reversing *Commissioners of Pilotage v. Steamboats Cuba, etc.*, 28 Ala. 185 (1856), as applied to such a vessel, was held invalid a requirement of filing a statement setting forth certain matters, the information thus required being also required by Congressional legislation. See also *Ryman Steamboat Line Co. v. Commonwealth*, 101 S. W. 403, 10 L. R. A. N. S. 1187 (Ct. App. Ky., 1907). To similar effect, *Foster v. Davenport*, 22 How. 244, 16 L. ed. 248 (Dec. T. 1859). So in *Moran v. New Orleans*, 112 U. S. 69, 5 Supm. 38, 28 L. ed. 653 (1884), of an ordinance imposing a license tax as a condition of owning and running tow-boats. Here the law imposing the tax declared that it should not be construed to be a tax on property. This overruled *City of New Orleans v. Eclipse Tow Boat Co.*, 33 La. Ann. 647, 39 Am. Rep. 279 (1881), and was followed in *Frere v. Von Schoeler*, 47 La. Ann. 324, 16 So. 808, 27 L. R. A. 414 (1895). To similar effect with *Moran v. New Orleans* is *Harman v. Chicago*, 147 U. S. 396, 13 Supm. 306, 37 L. ed. 216

least, as such vessels are engaged in transportation within the scope of the commerce clause, it is not apparent that the invalidity of such a restriction depends on the circumstance of such enrollment and license.

§ 73. Restriction as to transaction not within scope of commerce clause, though imposed upon one engaged in transportation within scope thereof.

So far as the commerce clause is concerned, there is no objection to the imposition of restrictions under the authority of a State, as to transactions not within the scope of the commerce clause, even though upon one engaged in transportation within the scope thereof.⁶⁷

(1893), reversing 140 Ill. 374, 29 N. E. 732 (1892). *Harman v. Chicago* was applied under like conditions in *City of St. Louis v. Consolidated Coal Co.*, 158 Mo. 342, 59 S. W. 103, 51 L. R. A. 850, 81 Am. St. Rep. 310 (1900).

As, however, to enforcing lien against such vessel under State statute, see *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388, 7 Supm. 254, 30 L. ed. 447 (1886).

⁶⁷ In *Kehrer v. Stewart*, 197 U. S. 60, 25 Supm. 403, 49 L. ed. 663 (1905), affirming 117 Ga. 969, 44 S. E. 854 (1903), was sustained as to sales within the State a tax "upon all agents of packing-houses doing business in this State," though concededly invalid as to interstate sales by the same agent in the same establishment. So held though the tax was a gross sum, not in terms confined to the intrastate business, and though the greater part of the business was concededly interstate. See, however, as to effect of intrastate being merely incidental to interstate business. *Kehrer v. Stewart* was followed under like conditions in *Smith v. Clark*, 122 Ga. 528, 50 S. E. 480 (1905). The same general rule was also applied in *Armour Packing Co. v. Lacy*, 200 U. S. 226, 26 Supm. 232, 50 L. ed. 451 (1906), affirming *Lacy v. Packing Co.*, 134 N. C. 567, 47 S. E. 53 (1904), where was accepted the construction of the State court that the tax, though imposed in general terms, did not apply to transportation within the scope of the commerce clause.

For instances, however, of provisions in general terms held not severable for the purpose of application to intrastate business, see *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 24 Supm. 39, 48 L. ed. 134 (1903). See as to effect of action of State officers

For instance, one engaged in transportation by railroad between points within and points without the State is not subject to the imposition of any restric-

in attempting to so limit application); *State v. Northern Pacific Express Co.*, 27 Mont. 419, 71 Pac. 404, 94 Am. St. Rep. 824 (1903).

See also *Gibson County v. Pullman South. Car Co.*, 42 Fed. 572 (C. C. Tenn., 1890); *Southern Ry. Co. v. City of Asheville*, 69 Fed. 359 (C. C. N. C., 1895).

To the doctrine stated in the text seems referable *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 12 Supm. 403, 36 L. ed. 164 (1892), sustaining the imposition of a tax in general terms upon the "franchise or business" of a corporation. To the same doctrine seems referable, if sustainable at all, *New York State v. Roberts*, 171 U. S. 658, 19 Supm. 58, 43 L. ed. 323 (1898), affirming *People ex rel. Parke, Davis, etc., Co. v. Roberts*, 91 Hun, 158, 36 N. Y. Suppl. 368 (3d Dept. 1895), which was affirmed without opinion in 149 N. Y. 608, 44 N. E. 1127 (1896). Here also was sustained the imposition of a tax in general terms upon the "franchise or business" of a corporation engaged in manufacturing wholly outside the State but selling its products within the State in the original packages. It also imported from foreign countries material sent in large part to its factory without the State, but in part sold within the State in the original packages. In answer to the objection that the imposition of the tax was in contravention of the commerce clause it was said: "Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested." Applied in *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. 239, 55 C. C. A. 93 (6th C. 1902). To say the least, this seems to be an extreme case.

For other decisions illustrating the general rule, see *State ex rel. Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21, 24 Supm. 202, 48 L. ed. 325 (1904), affirming *People ex rel. Pennsylvania R. R. Co. v. Knight*, 171 N. Y. 354, 64 N. E. 152, 98 Am. St. Rep. 610 (1902); *Attorney-General v. Electric Storage Battery Co.*, 188 Mass. 239, 74 N. E. 467 (1905); *People ex rel. Southern Cotton Oil Co. v. Wemple*, 131 N. Y. 64, 29 N. E. 1002, 27

tion by way of prohibition or otherwise upon such transportation, but, so far as the commerce clause is concerned, is subject to such restriction upon transportation that is wholly within the State,⁶⁸ and so as to transportation by express;⁶⁹ of transmission of

Am. St. Rep. 542 (1892), affirming 61 Hun, 83, 15 N. Y. Suppl. 446 (1891); *People ex rel. American Soda Fountain Co. v. Roberts*, 158 N. Y. 168, 52 N. E. 1104 (1899), reversing 29 App. Div. 585, 51 N. Y. Suppl. 487 (1898); *People ex rel. Klipstein v. Roberts*, 167 N. Y. 617, 60 N. E. 1117 (1901), affirming 36 App. Div. 597, 55 N. Y. Suppl. 950 (1899); *People ex rel. International Elevating Co. v. Roberts*, 116 App. Div. 30, 101 N. Y. Suppl. 184 (1906); *Barnhard v. Morrison*, 87 S. W. 376 (Tex. Civ. App., 1905).

See also *Spalding v. Baton Rouge*, 22 Fed. Cas. No. 13,200 (C. C. La., 1853); *American Smelting & Refining Co. v. People*, 34 Colo. 240, 82 Pac. 531 (1905).

In *Re Houston*, 47 Fed. 539, 14 L. R. A. 719 (C. C. Mo., 1891), one engaged in interstate sales was held not subject to a State tax by reason of a single instance of a sale of an article in his possession at the time and carried as a sample.

⁶⁸ *City of Anniston v. Southern Ry. Co.*, 112 Ala. 557, 20 So. 915 (Nov. T. 1896); *Alabama Great Southern R. R. Co. v. City of Bessemer*, 113 Ala. 668, 21 So. 64 (Nov. T. 1896); *Nashville, Chattanooga, etc., Ry. Co. v. Alabama City*, 134 Ala. 414, 32 So. 731 (Nov. T. 1901); *Southern Ry. Co. v. Mitchell*, 139 Ala. 629, 37 So. 85 (Nov. T. 1903); *Piedmont R. R. Co. v. Town of Reidsville*, 101 N. C. 404, 8 S. E. 124, 2 L. R. A. 284 (1888); *Railroad v. Harris*, 99 Tenn. 684, 711, 43 S. W. 115, 122, 53 L. R. A. 921, 931 (1897); *City of York v. Chicago, Burlington & Quincy R. R. Co.*, 56 Neb. 572, 76 N. W. 1065 (1898).

So as to transportation by sleeping car. *Pullman Co. v. Adams*, 189 U. S. 420, 23 Supm. 494, 47 L. ed. 877 (1903), affirming 78 Miss. 814, 30 So. 757, 84 Am. St. Rep. 647 (1901); *Allen v. Pullman Palace Car Co.*, 191 U. S. 171, 24 Supm. 39, 48 L. ed. 134 (1903); *State v. Pullman Co.*, 90 Pac. 319 (Supm. Ct. Kan., 1907).

⁶⁹ *Osborne v. Florida*, 164 U. S. 650, 17 Supm. 214, 41 L. ed. 586 (1897), affirming 33 Fla. 162, 14 So. 588, 39 Am. St. Rep. 99 (1894.) So held in view of construction of statute by State court that it applied only to intrastate business). See also *People ex rel. Platt v. Wemple*, 117 N. Y. 136, 149, 22 N. E. 1046, 1048, 6 L. R. A. 303, 308 (1889); *Express Co. v. State*, 55 Ohio St. 69, 44 N. E. 506 (1896).

intelligence by telegraph⁷⁰ or telephone.⁷¹ A tax imposed by way of restriction upon transactions not within the scope of the commerce clause seems open to no objection merely because of the amount thereof being determined with reference to transportation that is within its scope.⁷²

§ 73a. *Maine v. Grand Trunk Ry. Co.*⁷³

The general rule just considered seems that to which is properly referable, if sustainable at all, a decision

⁷⁰ Thus in *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 14 Supm. 1094, 38 L. ed. 871 (1894), affirming *Western Union Tel. Co. v. City Council of Charleston*, 56 Fed. 419 (C. C. S. C., 1893), was sustained municipal ordinance imposing license tax for business done exclusively within the municipality, and "not including any business done to or from points without the State." Followed under like conditions in *Western Union Tel. Co. v. City of Fremont*, 43 Neb. 499, 61 N. W. 724 (1895), reaffirming 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698 (1894). And see *Western Union Tel. Co. v. Village of Wakefield*, 69 Neb. 272, 95 N. W. 659 (1903). Also followed in *Postal Tel. Cable Co. v. City of Norfolk*, 101 Va. 125, 43 S. E. 207 (1903). To like effect, *Moore v. City of Eufaula*, 97 Ala. 670, 11 So. 921 (Nov. T. 1892-93); *People ex rel. Postal Tel. Cable Co. v. Campbell*, 70 Hun, 507, 24 N. Y. Suppl. 208 (1893); *State v. Western Union Tel. Co.*, 90 Pac. 299 (Supm. Ct. Kan., 1907). See also *Western Union Tel. Co. v. State*, 101 S. W. 748 (Supm. Ct. Ark. 1907).

⁷¹ *Ogden City v. Crossman*, 17 Utah, 66, 53 Pac. 985 (1898); *Johnstown v. Central District, etc., Tel. Co.*, 23 Pa. Super. 381 (1903); *State v. Rocky Mountain Bell Tel. Co.*, 27 Mont. 394, 71 Pac. 311 (1903).

⁷² Thus of a tax measured by reference to gross receipts therefrom. *Maine v. Grand Trunk Ry. Co.*, *infra* (§ 73a), which was applied in *Ficklen v. Shelby County Taxing District*, 145 U. S. 1, 12 Supm. 810 (1892). So of a tax on purchases and sales measured by amount of purchases "in or out of the State." *State v. French*, 109 N. C. 722, 14 S. E. 383, 26 Am. St. Rep. 590 (1891); *State v. Stevenson*, 109 N. C. 730, 14 S. E. 385, 26 Am. St. Rep. 595 (1891).

⁷³ 142 U. S. 217, 12 Supm. 121, 163, 35 L. ed. 994 (1891). This was followed, under like conditions, in *State v. Galveston, H. & S.*

that has produced much confusion. A Maine statute imposed upon every corporation, etc., operating any

A. Ry. Co. v. State, 97 S. W. 71 (Supm. Ct. Tex., 1906), overruling *Galveston, H. & S. A. Ry. Co. v. Davidson*, 93 S. W. 436 (Tex. Civ. App. 1906), where what seems to be a rather unsubstantial distinction had been sought to be established on the ground that in the case at bar it did not, as in *Maine v. Grand Trunk Ry. Co.* appear that the tax was intended as one upon "the business or occupation of the carrier." *Maine v. Grand Trunk Ry. Co.* was followed as applicable. See also *State v. Missouri, K. & T. Ry. Co.*, 100 S. W. 146 (Supm. Ct. Tex., 1907). It was followed as applicable to a domestic railroad corporation, in *Cumberland & Pennsylvania R. R. Co. v. State*, 92 Md. 668, 48 Atl. 503, 52 L. R. A. 764 (1901).

Maine v. Grand Trunk Ry. Co. was conspicuously misapplied in *People ex rel. Dunkirk, Allegheny Valley, etc., R. R. Co. v. Campbell*, 74 Hun, 210, 26 N. Y. Suppl. 832 (1893), in sustaining a tax upon the gross earnings of a domestic railroad corporation arising from interstate business, thus as a "franchise tax," measured by such earnings. *Fargo v. Michigan*, 121 U. S. 230, 7 Supm. 857, 30 L. ed. 888 (1887) (see § 114), naturally gave the court some difficulty, and an abortive attempt was made to distinguish it as a case of a foreign corporation, there being entirely overlooked *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Supm. 1118, 30 L. ed. 1200 (1887), reversing 104 Pa. St. 109 (1883), which shows that no such distinction can be made. *Maine v. Grand Trunk Ry. Co.* was also misapplied as "on all fours with the present case," in *Tide-water Pipe Co. v. State Board of Assessors*, 59 N. J. Law, 269, 39 Atl. 1114 (1896), affirming 57 N. J. Law, 516, 31 Atl. 220, 27 L. R. A. 684 (1895), where, though it expressly appeared that *the entire business of the corporation* in question was interstate commerce, there was sustained a franchise tax upon a proportionate amount of its gross receipts. The same misapprehension appears in *People ex rel. International Elevating Co. v. Roberts*, 116 App. Div. 30, 101 N. Y. Suppl. 184 (1906).

Maine v. Grand Trunk Ry. Co. also seems to have been misapplied in *Commissioner of Railroads v. Wabash R. R. Co.*, 126 Mich. 113, 85 N. W. 466 (1901), as authority for including in the regulation of rates for transportation by railroad "the amount of interstate fares earned by that portion of the road lying within the State." (See § 67.)

railroad in the State “an annual excise tax *for the privilege of exercising its franchises in this State.*” In case of a railroad partly within and partly without the State, the tax was to be *equal to a proportion of its gross receipts* according to its mileage within the State. Such statute was held properly applied to a foreign railroad corporation, which, though not so distinctly stated, seems clearly enough to have been engaged in interstate and international transportation. It was doubtless also engaged in intrastate transportation, though here again this is not distinctly stated. Apart from the effect of the doctrine which elsewhere we have emphatically disapproved of, by which a State tax on gross receipts is invalid, the decision seems sound enough as merely an application of the doctrine enabling a State to determine the terms on which a foreign corporation may engage in an intrastate business. But the existence of the rule forbidding a tax on gross receipts here, as elsewhere, produces confusion, and makes the decision rest on a hair-splitting distinction between a tax on the receipts themselves and a tax, the amount of which is determined by a reference to the amount of the receipts. As noted above, the explicit language of the statute was that the tax should “*be equal to*” a proportion of such receipts. On the supposition of the soundness of the doctrine of the invalidity of a State tax on gross receipts, the opinion of the four dissenting judges seems to furnish by far the better reason.

§ 74. The same; in case of one engaged in public employment.

The rule sustaining restrictions as to transactions not within the scope of the commerce clause, though upon one engaged in transportation within the scope thereof, has commonly been applied without reference to whether the person (or corporation) upon whom the restriction is imposed is engaged in a “public

employment," and under a duty to serve generally those applying for performance of service. Thus, suppose a railroad carrier engaging in transportation between points within and points without a State, to be under a duty to also engage in transportation between points in the same State. If now, there be sustained a restriction imposed under authority of the State upon transportation within the State merely, it follows that in a sense the restriction operates upon transportation within the scope of the commerce clause. For the carrier cannot engage in such transportation without subjecting himself to the duty to engage in intrastate transportation and consequently to the restriction imposed under State authority. The better view seems to be that this is merely an incidental or indirect effect, so as not to invalidate the restriction as applied to intrastate transportation.⁷⁴

⁷⁴ In *Pullman Co. v. Adams*, 189 U. S. 420, 23 Supm. 494, 47 L. ed. 877 (1903), affirming 78 Miss. 814, 30 So. 757, 84 Am. St. Rep. 647 (1901), the restriction was sustained on the ground that according to local law there was no obligation to engage in intrastate transportation, it being said: "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." To like effect, *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 24 Supm. 39, 48 L. ed. 134 (1903), where, however, it was contended, in argument, that the tax in question was "assessed upon traffic which bears such small proportion to the entire business of the company within the State, that it could not have been levied in good faith upon purely local business, and is but a thinly disguised attempt to tax the privilege of interstate traffic." The court said: "If the payment of this tax were compulsory upon the company before it could do a carrying business within the State, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection." See also *State v. Western Union Tel. Co.*, 90 Pac. 299 (Supm. Ct. Kan., 1907); *State v. Galveston, H. & S. A. Ry. Co.*, 97 S. W. 71 (Supm. Ct. Tex., 1906).

§ 75. Restriction upon contract of sale.

It is obvious that transportation within the scope of the commerce clause has no necessary reference to any sale or contract of sale of the article transported. Nor do the restrictions just considered have any such reference. But we pass now to a consideration of sales or contracts of sale that are within the scope of the commerce clause, because involving transportation that is within such scope. The case ordinarily presented is that of a contract for the sale of personal property, to be, for the purpose of performing the contract, transported from a point within to a point without a State, or vice versa. Commonly, though not necessarily,⁷⁵ such contracts are entered into by agents (such as those traveling agents popularly characterized as "drummers") of the producers or dealers. And commonly, though not necessarily,⁷⁶ the restriction is in the form of a tax or fee upon such agent, that is to say, imposed upon him as a condition of entering into such a contract of sale, a tax upon the seller being justly regarded as in effect upon the article sold.⁷⁷ As in case of the restrictions

⁷⁵ Thus, in the absence of such agency, the rule was applied in *Norfolk & Western Ry. Co. v. Sims*, *infra*.

⁷⁶ In *Re Schechter*, 63 Fed. 695 (C. C. Minn., 1894), for instance, the requirement held invalid was of the filing of an affidavit and bond, and the exhibition to a purchaser of a certificate showing compliance with such requirement. Of doubtful soundness seems *Commonwealth v. Strauss*, 191 Mass. 545, 78 N. E. 136 (1906), sustaining as to such contract prohibition of condition therein that the buyer should not sell or deal in the goods of another. On the other hand, in *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. 242, 74 C. C. A. 462 (8th C. 1906), the provisions of a State "anti-trust act" were held inapplicable to such a contract. As to effect of ordinance prohibiting distribution of circulars, etc., on streets, see *International Text-Book Co. v. Inhabitants of Auburn*, 155 Fed. 986 (C. C. Me., 1907).

⁷⁷ See *Kehrer v. Stewart*, *infra*, citing *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678 (1827); *Welton v. Missouri*, 91 U. S.

just considered, the imposition of such a restriction upon the contract of sale is clearly established to be invalid,⁷⁸ and it is none the less invalid, because of the property in such article not passing to the buyer until delivery to him, thus, upon payment of the price.⁷⁹ Nor does it ordinarily make any difference

275, 23 L. ed. 347 (Oct. 1875). To the same effect, *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015 (Oct. 1878); *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. 609, 11 L. R. A. 179 (C. C. N. C., 1890).

⁷⁸ See § 75a and numerous decisions therein cited. That it makes no difference that the contract by its terms was such as might equally well have been performed by delivery of goods obtained within the State, see *Commonwealth v. Rearick*, 26 Pa. Super. 384 (1904); reversed in *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Supm. 159, 51 L. ed. 295 (1906). But as to effect of evasion by needlessly sending orders to points outside of, instead of inside, State, see *People v. Smith*, 147 Mich. 391, 110 N. W. 1102 (1907); *Kimmell v. State*, 104 Tenn. 184, 56 S. W. 854 (1900). As to sending out of State liquor manufactured therein and re-shipping it into State as a "device to evade the laws of the State," see § 98.

In *State v. Gorham*, 115 N. C. 721, 20 N. E. 179, 25 L. R. A. 810, 44 Am. St. Rep. 494 (1894), the condition was held validly imposed on account of putting up lightning rods in pursuance of a contract of sale thereof. As to contract for installation of elevators, see *Portland Co. v. Hall & Grant Constr. Co.*, 121 App. Div. 779, 106 N. Y. Suppl. 649 (1907).

As to restrictions upon contracts for sale of intoxicating liquors, see § 99.

⁷⁹ So held in *Norfolk & Western Ry. Co. v. Sims*, 191 U. S. 441, 24 Supm. 151, 48 L. ed. 254 (1903), reversing *Sims v. Norfolk & Western R. R. Co.*, 130 N. C. 556, 41 S. E. 673 (1902), in case of an ordinary C. O. D. consignment. To like effect, *American Express Co. v. Iowa*, 196 U. S. 133, 25 Supm. 182, 49 L. ed. 417 (1905), reversing *State v. American Express Co.*, 118 Iowa, 447, 92 N. W. 66 (1902); *Adams Express Co. v. Iowa*, 196 U. S. 147, 25 Supm. 185, 49 L. ed. 424 (1905); *State v. Intoxicating Liquors*, 101 Me. 430, 64 Atl. 812 (1906); *Sedgwick v. State*, 85 S. W. 813 (Tex. Crim. App. 1905); *Taggart v. State*, 85 S. W.

that transportation is not directly from the seller to the buyer; thus, it may be directly from the seller to his agent in the State, and thereafter from the agent to the buyer. Nor does it make any difference that, as commonly happens for convenience sake, the articles are transported "in bulk" to the agent, who thereafter "breaks" the bulk and makes distribution of the articles therein contained to the respective buyers.⁸⁰ In accordance with what has already been

1155 (Tex. Crim. App. 1905); *Hickcox v. State*, 85 S. W. 1198 (Tex. Crim. App. 1905); *Donley v. State*, 89 S. W. 553 (Tex. Crim. App. 1905); *Crescent Liquor Co. v. Platt*, 148 Fed. 894 (C. C. W. Va., 1906); *Adams Express Co. v. Commonwealth*, 96 S. W. 593 (Ct. App. Ky., 1906). See *City of Carthage v. Duvall*, 202 Ill. 234, 66 N. E. 1099 (1903); *City of Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831 (1903).

The effect of the decisions of the Supreme Court seems to have been overlooked or ignored in *Town of Canton v. McDaniel*, 188 Mo. 207, 225, 86 S. W. 1092, 1097 (1905), seemingly to the contrary.

As to transportation of liquor C. O. D., to one who has not ordered it sent to him, see § 99. See as to sales C. O. D., article in 4 Columbia Law Rev. 541 (1904), by C. N. Gregory.

⁸⁰ Thus, in *Caldwell v. North Carolina*, 187 U. S. 622, 632, 23 Supm. 229, 233, 47 L. ed. 336 (1903), reversing *State v. Caldwell*, 127 N. C. 521, 37 S. E. 138 (1900), the restriction was held invalid as to a sale of pictures and frames, where the agent, after breaking the bulk, placed the pictures in their proper frames. Followed under like conditions in *State v. Trotman*, 142 N. C. 662, 55 S. E. 599 (1906); *Commonwealth v. Baldwin*, 96 S. W. 914 (Ct. App. Ky., 1906); *Matter of Julius*, 26 Ohio Cir. Ct. Rep. 423 (1904); also in *Stone v. State*, 117 Ga. 292, 43 S. E. 740 (1903), which seems to overrule *Racine Iron Co. v. McCommons*, 111 Ga. 536, 36 S. E. 866, 51 L. R. A. 134 (1900). To like effect, *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Supm. 159, 51 L. ed. 295 (1906), which was distinguished and said to "carry the protection of the commerce clause to its utmost limit," in *Loverin & Brown Co. v. Tansil*, 102 S. W. 77 (Supm. Ct. Tenn., 1907), which may itself be open to objection as failing to give effect to the rule applied in *Caldwell v. North Carolina* and other decisions, *supra*.

seen, there is, so far as the commerce clause is concerned, no objection to the imposition of restrictions as to sales or contracts of sale not within the scope of the commerce clause, though upon one engaged in sales or contracts of sale that are within the scope thereof.⁸¹

Here a privilege tax was sustained on account of sale of articles shipped in hulk to the agent and designed for different customers, from whom orders had been taken. There had been, however, at the time of receipt by the agent no segregation of any articles from others of like kind, and no appropriation of any particular article to any particular customer. The agent opened the packages, classified and segregated the contents and appropriated them to different customers.

The rule as stated in the text is also sustained by *Re Spain*, 47 Fed. 208, 14 L. R. A. 97 (C. C. N. C., 1891); *City of Huntington v. Mahan*, 142 Ind. 695, 42 N. E. 463, 51 Am. St. Rep. 200 (1895); *Menke v. State*, 70 Neb. 669, 97 N. W. 1020 (1904); *Turner v. State*, 41 Tex. Crim. 545, 55 S. W. 834 (1900) *State v. Willingham*, 9 Wyom. 290, 62 Pac. 797, 52 L. R. A. 198, 87 Am. St. Rep. 948 (1900). See also *Re Tinsman*, 95 Fed. 648 (C. C. Cal., 1899).

On this point seems overruled *Collier v. Burgin*, 130 N. C. 632, 41 S. E. 874 (1902); and the effect of *Caldwell v. North Carolina* seems to have been overlooked or ignored, in *Town of Canton v. McDaniel*, 188 Mo. 207, 225, 86 S. W. 1092, 1097 (1905), which, to say the least, seems difficult to reconcile with *Caldwell v. North Carolina*. See also *New Castle v. Cutler*, 15 Pa. Super. 612 (1901); *Thomas Manuf. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989 (1907).

⁸¹ *Ficklen v. Shelby County Taxing District*, 145 U. S. 1, 12 Supm. 810, 36 L. ed. 601 (1892), seems sustainable as a border line case, if at all. Here the imposition of a tax on dealers on commission, etc., was sustained as to a person who had taken out a license to do a *general commission business*, but who, during the year previous to that for which the tax was imposed, had done a purely interstate business, that is, soliciting orders that were filled by transportation into the State. So too as to another person whose business during such period had been mostly an interstate business. See this decision distinguished in *Stockard v. Morgan*, 185 U. S. 27, 22 Supm. 576, 46 L. ed. 785 (1902). It was followed

§ 75a. *Robbins v. Shelby County Taxing District.*

A Tennessee statute prohibiting, under a penalty, drummers⁸² from selling goods by sample, without in, *Walton v. City Council of Augusta*, 104 Ga. 757, 30 S. E. 964 (1898). See *Texas Co. v. Stephens*, 103 S. W. 481, 487 (Supm. Ct. Tex., 1907).

⁸² 120 U. S. 489, 7 Supm. 592, 30 L. ed. 694 (1887), reversing 13 Lea (Tenn.), 303 (1884). *Robbins v. Shelby County Taxing District* was followed under like conditions in *Corson v. Maryland*, 120 U. S. 502, 7 Supm. 655, 30 ed. 699 (1887), reversing 57 Md. 251 (1881); *Asher v. Texas*, 128 U. S. 129, 9 Supm. 1, 32 L. ed. 368 (1888), reversing 23 Tex. Ct. App. Rep. 662, 5 S. W. 91 (1887); *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Supm. 256, 32 L. ed. 637 (1889), affirming *Re Hennick*, 5 Mackey (D. C.), 489 (1887), and overruling, it seems, *District of Columbia v. Humason*, 2 MacArthur (D. C.), 158 (1875). So in *Brennan v. Titusville*, 153 U. S. 289, 14 Supm. 829, 38 L. ed. 719 (1894), reversing *City of Titusville v. Brennan*, 143 Pa. St. 642, 22 Atl. 893, 14 L. R. A. 100, 24 Am. St. Rep. 580 (1891); *Stockard v. Morgan*, 185 U. S. 27, 22 Supm. 576, 46 L. ed. 785 (1902; held to make no difference that the agents "acted for more than one person residing outside of" the State), reversing 105 Tenn. 412, 58 S. W. 1061 (1900). See also *Walling v. Michigan*, 116 U. S. 446, 6 Supm. 454, 29 L. ed. 691 (1886).

For various applications of the rule, usually under conditions substantially identical with those involved in *Robbins v. Shelby County Taxing District*, see the following decisions. In many instances the tax was imposed under a municipal ordinance instead of a statute, but so far as we are here concerned, the distinction is immaterial.

Thus, in the lower Federal courts, *Ex parte Stockton*, 33 Fed. 95 (D. C. Tex., 1887); *Re Kimmel*, 41 Fed. 775 (D. C. Minn., 1890); *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. 609, 11 L. R. A. 179 (C. C. N. C., 1890); *Re White*, 43 Fed. 913, 11 L. R. A. 284 (C. C. Pa., 1890); *Re Nichols*, 48 Fed. 164 (C. C. Pa. 1891); *Re Tyerman*, 48 Fed. 167 (C. C. Pa., 1891); *Re Rozelle*, 57 Fed. 155 (C. C. Ark., 1893); *Re Flinn*, 57 Fed. 496 (C. C. N. C., 1893); *State v. Lagarde*, 60 Fed. 186 (C. C. La., 1894); *Re Mitchell*, 62 Fed. 576 (D. C. Wis., 1894); *Aultman v. Holder*, 68 Fed. 467 (C. C. Mich., 1895); *Re Minor*, 69 Fed. 233 (C. C. W. Va., 1895); *Ex parte Hough*, 69 Fed. 330 (C. C. N. C., 1895); *Ex parte Green*, 114 Fed. 959 (C. C. Ky., 1902); *Chicago Portrait Co.*

having obtained a license (to be obtained on payment of a specified sum), was held invalid as applied to one drumming in the State, that is, soliciting trade

v. Mayor, etc., of Macon, 147 Fed. 967 (C. C. Ga., 1899); *Ex parte Hull*, 153 Fed. 459 (C. C. Ala., 1907). See also *Wagner v. Meakin*, 92 Fed. 76, 83, 33 C. C. A. 577, 583 (5th C. 1899).

So in the State courts, *State v. Agee*, 83 Ala. 110, 3 So. 856 (Dec. T. 1887); *Ex parte Murray*, 93 Ala. 78, 8 So. 868 (Nov. T. 1890); *Stratford v. City Council of Montgomery*, 110 Ala. 619, 20 So. 127 (Nov. T. 1895); *International Trust Co. v. Leschen*, 92 Pac. 727 (Supm. Ct. Colo., 1907); *Wrought Iron Range Co. v. Johnson*, 84 Ga. 754, 11 S. E. 233, 8 L. R. A. 273 (1890); *McClelland v. Mayor, etc., of Marietta*, 96 Ga. 749, 22 S. E. 329 (1895); *Re Kinyon*, 9 Idaho, 642, 75 Pac. 268 (1904); *City of Bloomington v. Bourland*, 137 Ill. 534, 27 N. E. 692, 31 Am. St. Rep. 382 (1891); *Havens & Geddes Co. v. Diamond*, 93 Ill. App. 557 (1900); *McLaughlin v. City of South Bend*, 126 Ind. 471, 26 N. E. 185, 10 L. R. A. 357 (1891); *Martin v. Town of Rosedale*, 130 Ind. 109, 29 N. E. 410 (1891); *City of Fort Scott v. Pelton*, 39 Kan. 764, 18 Pac. 954 (1888); *Commonwealth v. Hogan*, 74 S. W. 737 (Ct. App. Ky., 1903); *Commonwealth v. Eclipse Hay Press Co.*, 104 S. W. 224 (Ct. App. Ky., 1907); *Simmons Hardware Co. v. McGuire*, 39 La. Ann. 848, 2 So. 592 (1887); *McClellan v. Pettigrew*, 44 La. Ann. 356, 10 So. 853 (1892); *People v. Bunker*, 128 Mich. 160, 87 N. W. 90 (1901); *Richardson v. State*, 11 So. 934 (Supm. Ct. Miss., 1892); *Overton v. City of Vicksburg*, 70 Miss. 558, 13 So. 226 (1893); *State v. Snoddy*, 128 Mo. 523, 31 S. W. 36 (1895); *Ex parte Rosenblatt*, 19 Nev. 439, 14 Pac. 298, 3 Am. St. Rep. 901 (1887); *People ex rel H. B. Smith Co. v. Roberts*, 27 App. Div. 455, 50 N. Y. Suppl. 355 (1898); *State v. Bracco*, 103 N. C. 349, 9 S. E. 404 (1889); *State v. O'Connor*, 5 N. D. 629, 67 S. W. 824 (1896); *Baxter v. Thomas*, 4 Okla. 605, 46 Pac. 479 (1896); *Commonwealth v. Walker*, 14 Pa. Co. 586 (1894); *State v. Rankin*, 11 S. D. 144, 76 N. W. 299 (1898); *Hurford v. State*, 91 Tenn. 669, 20 S. W. 201 (1892); *State v. Scott*, 98 Tenn. 254, 39 S. W. 1, 36 L. R. A. 461 (1897; soliciting pictures to be enlarged outside the State); *Ex parte Holman*, 36 Tex. Crim. 255, 36 S. W. 441 (1896); *Talbutt v. State*, 39 Tex. Crim. 64, 44 S. W. 1091 (1898); *Harkins v. State*, 75 S. W. 26 (Tex. Crim. App. 1903); *De Witt v. Berger Manuf. Co.*, 81 S. W. 334 (Tex. Civ. App. 1904); *Adkins v. City of Richmond*, 98 Va. 91, 34 S. E. 967, 47 L. R. A. 583, 81 Am. St. Rep. 702 (1900); *State v. Lichtenstein*, 44 W. Va. 99, 28 S. E. 753

by the use of samples, for persons doing business in another State.

§ 76. The same; in case of transportation not within scope of commerce clause.

So far as the commerce clause is concerned, there is, speaking generally, no objection to the imposition of restrictions under the authority of a State, as to contracts of sale not involving transportation within the scope of the commerce clause, thus, merely involving transportation wholly within the State. Nor does it necessarily⁸³ make any difference that the article in question was originally transported into from outside of the State.⁸⁴ This is, perhaps, more

(1897); *Greek-American Sponge Co. v. Richardson Drug Co.*, 124 Wis. 469, 102 N. W. 888, 109 Am. St. Rep. 961 (1905); *Clements v. Town of Casper*, 4 Wyom. 494, 35 Pac. 472 (1894).

Among decisions that seem overruled as contrary to the established rule are *Lang v. Lynch*, 38 Fed. 489, 4 L. R. A. 831 (C. C. N. H., 1889); *Ex parte Hanson*, 28 Fed. 127 (D. C. Oreg., 1886); *Re Rudolph*, 2 Fed. 65 (C. C. Nev., 1880); *Ex parte Thornton*, 12 Fed. 538 (C. C. Va., 1882); *Ex parte Robinson*, 12 Nev. 263 (1877); *State v. Long*, 95 N. C. 582, 59 Am. Rep. 263 (1886); *Territory v. Farnsworth*, 5 Mont. 303, 5 Pac. 869 (1885).

See *Ex parte Davis*, 21 Fed. 396 (C. C. Ky., 1884); *Commonwealth v. Smith*, 6 Bush (Ky.), 303 (1869); *Mork v. Commonwealth*, 6 Bush (Ky.), 397 (1870); *State v. Ivey*, 73 S. C. 282, 53 S. E. 428 (1906); *Shaw Piano Co. v. Ford*, 41 S. W. 198 (Tex. Civ. App. 1897).

⁸³ As to effect of discrimination, see § 78.

⁸⁴ Thus, in *Machine Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754 (Oct. 1879), affirming *Howe Machine Co. v. Gage*, 9 Baxt. (Tenn.) 518 (1876), was sustained a statute imposing a tax upon the pedlers of sewing machines, as applied to such machines manufactured in another State, there being, however, no discrimination between machines manufactured in and those manufactured outside of the State. It was said in *Norfolk & Western Ry. Co. v. Sims*, 191 U. S. 441, 24 Supm. 151, 48 L. ed. 254 (1903), that the sale under consideration in *Machine Co. v. Gage*, was made "ap-

obviously the case where the article is in the possession of the seller at the time of the contract and im-

parently from a stock kept in the State." So in *Emert v. Missouri*, 156 U. S. 296, 15 Supm. 367, 39 L. ed. 430 (1895), affirming *State v. Emert*, 103 Mo. 241, 15 S. W. 81, 11 L. R. A. 219 (1890), as to one acting as an employee of a foreign manufacturer and soliciting orders for the sale of machines, having with him in a wagon at least one of such machines, offering it for sale and delivering it to the purchaser. It did not appear that he ever offered for sale any machine that he did not have with him at the time. To similar effect, *American Harrow Co. v. Shaffer*, 68 Fed. 750 (C. C. Va., 1895); appeal dismissed in 166 U. S. 718, 17 Supm. 991, 41 L. ed. 1187 (1897); *City of South Bend v. Martin*, 142 Ind. 31, 41 N. E. 315, 29 L. R. A. 531 (1895); *State v. Wessell*, 109 N. C. 735, 14 S. E. 391 (1891); *Ex parte Butin*, 28 Tex. Ct. App. Rep. 304, 13 S. W. 10 (1889); *Saulsbury v. State*, 43 Tex. Crim. 90, 63 S. W. 568 (1901). So in *State v. Montgomery*, 92 Me. 433, 43 Atl. 13 (1899), of one soliciting orders for picture frames in his possession at the time, though containing pictures delivered in pursuance of a contract of interstate sale. To like effect, *Chrystal v. Mayor, etc., of Macon*, 108 Ga. 27, 33 S. E. 810 (1899); *State v. Looney*, 97 S. W. 934 (Supm. Ct. Mo., 1906). See to the contrary, on apparently an identical state of facts, *City of Laurens v. Elmore*, 55 S. C. 477, 33 S. E. 560, 45 L. R. A. 249 (1899); *Chicago Portrait Co. v. Mayor, etc., of Macon*, 147 Fed. 967 (C. C. Ga., 1899). So in *Re Pringle*, 67 Kan. 364, 72 Pac. 864 (1903), of a sale by a person taking orders for himself for goods which he intended to, and did, purchase, and which he received and paid for in the State, the orders of the final recipients not being transmitted, or accepted or filled by any one, beyond the State, and the goods not being delivered for transportation by carrier to them. To similar effect, *Kimmell v. State*, 104 Tenn. 184, 56 S. W. 854 (1900). So in *Croy v. Obion County*, 104 Tenn. 525, 58 S. W. 235, 51 L. R. A. 254 (1900). So in *City of Muskegon v. Zeeryp*, 134 Mich. 181, 96 N. W. 502 (1903), where the orders, without being sent outside the State, were filled from a general stock kept in the State. To similar effect seem *City of Alma v. Clow*, 146 Mich. 443, 109 N. W. 853 (1906); *City of Muskegon v. Hanes*, 112 N. W. 1077 (Supm. Ct. Mich., 1907); *Duncan v. State*, 105 Ga. 457, 30 S. E. 755 (1898); *Price Co. v. City of Atlanta*, 105 Ga. 358, 31 S. E. 619 (1898). So in *Fay Fruit Co. v. McKinney*, 103 Mo. App. 304, 77 S. W. 160 (1903), of sale from stock in car

mediately delivered, but the same is true where, for the purpose of performing the contract, the article is transported from another point in the same State.

§ 77. The same; in case of property transported into State and remaining in original package.

It has been seen that, according to the "original package" doctrine, "transportation of property that had been shipped into the State. See also *Thomas Manuf. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989 (1907); *Milburn Wagon Co. v. Commonwealth*, 104 S. W. 323 (Ct. App. Ky., 1907). For various instances of such restrictions held validly imposed upon pedlers or other itinerant sellers, see *Hynes v. Briggs*, 41 Fed. 468 (C. C. Ark., 1890); *Seymour v. State*, 51 Ala. 52 (1874); *Re Wilson*, 8 Mackey (D. C.), 341, 12 L. R. A. 624 (1890); *Hall v. State*, 39 Fla. 637, 675, 23 So. 119, 123 (1897); *Re Abel*, 10 Idaho, 288, 77 Pac. 621 (1904); *City of Carrollton v. Bazzette*, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522 (1896); *Martin v. Town of Rosedale*, 130 Ind. 109, 29 N. E. 410 (1891); *Rash v. Farley*, 91 Ky. 344, 15 S. W. 862, 34 Am. St. Rep. 233 (1891); *Cole v. Randolph*, 31 La. Ann. 535 (1879); *State v. Montgomery*, 94 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386 (1900); *Commonwealth v. Ober*, 12 Cush. (Mass.) 493 (1853); *People v. Sawyer*, 106 Mich. 428, 64 N. W. 333 (1895); *Kolb v. Mayor, etc., of Boonton*, 64 N. J. Law, 163, 44 Atl. 873 (1899); *Territory v. Russell*, 86 Pac. 551 (Supm. Ct. N. M., 1906); *Cowles v. Brittain*, 2 Hawks (N. C.), 204 (1822); *Wrought Iron Range Co. v. Carver*, 118 N. C. 328, 24 S. E. 352 (1896); *Re Lipschitz*, 95 N. W. 157 (Supm. Ct. N. D., 1903); *Commonwealth v. Dunham*, 191 Pa. St. 73, 43 Atl. 84 (1899); *State v. Richards*, 32 W. Va. 348, 9 S. E. 245, 3 L. R. A. 705 (1889); *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12 (1875). So in *Oilure Manuf. Co. v. Pidduck-Ross Co.*, 38 Wash. 137, 80 Pac. 276 (1905), as to soliciting business by means of so-called "trading stamps."

In *Saulsbury v. State*, 43 Tex. Crim. 90, 63 S. W. 568, 96 Am. St. Rep. 837 (1901), held to make no difference that the pedler occasionally took an order for goods to be shipped into the State. See *State v. Snoddy*, 128 Mo. 523, 31 S. W. 36 (1895).

See, generally, as to such sales, *Commonwealth v. Gardner*, 133 Pa. St. 284, 19 Atl. 550, 7 L. R. A. 666, 19 Am. St. Rep. 645 (1890); *Port Clinton Borough v. Shafer*, 5 Pa. Dist. 583 (1896).

within the scope of the commerce clause continues even after arrival at its final destination," that is to say, it "remains under the shelter of the interstate commerce clause" until, by a sale in the original package, it has been "commingled with the general mass of property in the State."⁸⁵ It seems to follow that the rule just considered applies to invalidate a restriction upon a contract for the sale of property, that, though at the time within the State, remains in the original package after transportation into the State.⁸⁶

As to sale, upon default of buyer, to another, see *State v. Cohen*, 65 Kan. 849, 70 Pac. 600 (1902).

⁸⁵ See § 17.

⁸⁶ In *Range Co. v. Campen*, 135 N. C. 506, 47 S. E. 658 (1904), the imposition of a license tax was held invalid as to the sale of ranges by sample, the orders being filled from a warehouse within the State, to which the ranges had been shipped from without the State. But the delivery to the purchaser was in "the identical and original form or packages" in which they had been shipped into the State. Here were thus sought to be distinguished *Machine Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754 (Oct. 1879); *Emert v. Missouri*, 156 U. S. 296, 15 Supm. 367, 39 L. ed. 430 (1895) (see § 76); "It does not appear in those two cases that the goods were sold in the original packages, and furthermore the court bases its decision of them upon the ground that the State was exercising its police power, and the tax was laid in the exercise of that power and not merely for the purpose of raising revenue, as in our case." And *Emert v. Missouri* was distinguished as a case of taxation "strictly as a pedler." So in *Henderson v. Ortte*, 114 La. 523, 38 So. 440 (1905), one peddling sewing machines that were "original packages" was held within the protection of the "original package" doctrine. To similar effect, *Pegues v. Ray*, 50 La. Ann. 574, 23 So. 904 (1898); *Matter of Wilson*, 10 N. M. 32, 60 Pac. 73, 48 L. R. A. 417 (1900). So too *French v. State*, 42 Tex. Crim. 222, 58 S. W. 1015, 52 L. R. A. 160 (1900); *Kirkpatrick v. State*, 42 Tex. Crim. 459, 60 S. W. 762 (1901), which were, however, overruled in *Saulsbury v. State*, 43 Tex. Crim. 90, 63 S. W. 568, 96 Am. St. Rep. 837 (1901), in

Such application of the rule seems, however, to have frequently been disregarded in sustaining the imposition of restrictions as to property thus remaining in the original package.⁸⁷

§ 78. Discrimination against articles transported into State, or against nonresident.

It has been seen that, so far as the commerce clause is concerned, there is, speaking generally, no objection to the imposition of restrictions under the authority of a State, as to contracts of sale not involving transportation within the scope of the commerce clause, and that it makes no difference that the article in question was originally transported into from outside of the State. Nevertheless, by what clearly seems to us an illegitimate application of the commerce clause, it seems established that, by virtue thereof, there may be invalid a restriction imposed under the authority of a State upon a sale under the conditions above stated, if such restriction be by way of discrimination against the products of another State, or of a foreign country,⁸⁸ and in favor of products of the State. It is

view of *Emert v. Missouri*. See also *Camp v. State*, 42 Tex. Crim. 499, 61 S. W. 401 (1901). The same principle seems recognized in *Commonwealth v. Harmel*, 166 Pa. St. 89, 30 Atl. 1036, 27 L. R. A. 388 (1895). See also *State v. Smithson*, 106 Mo. 149, 17 S. W. 221 (1891); *State v. Parsons*, 124 Mo. 436, 27 S. W. 1102, 46 Am. St. Rep. 457 (1894).

⁸⁷ See, for instance, *West v. City of Mount Sterling*, 65 S. W. 120 (Ct. App. Ky., 1901), and decisions cited in § 76. Thus, in *State v. Wheelock*, 95 Iowa, 577, 64 N. W. 620, 30 L. R. A. 429, 58 Am. St. Rep. 442 (1895), as to sale of drugs, nostrums, etc.

⁸⁸ Thus a discrimination against articles imported from a foreign country was held invalid in *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015 (Oct. 1878). To like effect, *State v. Pratt*, 59 Vt. 590, 9 Atl. 556 (1887); *Commonwealth v. Caldwell*, 190 Mass. 355, 76 N. E. 955, 112 Am. St. Rep. 334 (1906). On this point seems overruled *Beall v. State*, 4 Blackf. (Ind.) 107 (1835).

said that "the commercial power continues until the commodity has ceased to be the subject of discriminative legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin."⁸⁹ It is, however, hard to see how

⁸⁹ *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347 (Oct. 1875), reversing *State v. Welton*, 55 Mo. 288 (1874). Here was held invalid a statute prohibiting dealing without a license "by going from place to place to sell the same," in any of specified articles "not the growth, produce or manufacture of this State," no such license being required as to articles, the growth, etc., of the State. See also *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382 (Dec. 1868); *Hinson v. Lott*, 8 Wall. 148, 19 L. ed. 387 (Dec. 1868); *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743 (Oct. 1879); *Tiernan v. Rinker*, 102 U. S. 123, 26 L. ed. 103 (Oct. 1880); *Plumley v. Massachusetts*, 155 U. S. 461, 471, 15 Supm. 154, 157, 39 L. ed. 223 (1894); *Austin v. Tennessee*, 179 U. S. 343, 349, 21 Supm. 132, 134, 45 L. ed. 224 (1900); *Cox v. Texas*, 202 U. S. 446, 26 Supm. 671, 50 L. ed. 1099 (1906); *McGuire v. State*, 42 Ohio St. 530 (1885); *Darnell v. City of Memphis*, 116 Tenn. 424, 95 S. W. 816 (1906). So in *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565 (Oct. 1880), reversing 33 Gratt. (Va.) 898 (1880), of a statute requiring a license to be taken out by "any person who shall sell, or offer for sale, the manufactured articles or machines of other States or Territories, unless he be the owner thereof and taxed as a merchant, or take orders therefor, on commission or otherwise." So in *People v. Hawkins*, 85 Hun, 43, 32 N. Y. Suppl. 524 (1895), of discrimination against articles made by convict labor employed in any other State. To like effect, *Arnold v. Yanders*, 56 Ohio St. 417, 47 N. E. 50, 60 Am. St. Rep. 753 (1897). See also *People v. Hawkins*, 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736 (1898). So in *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776 (1901), of requirement that materials used in public works be produced within the State, but to the contrary seems *Allen v. Labsap*, 188 Mo. 692, 699, 87 S. W. 926, 928 (1905). So in *State v. Omaha & Council Bluffs Ry., etc., Co.*, 113 Iowa, 30, 84 N. W. 983, 52 L. R. A. 315, 86 Am. St. Rep. 357 (1901), of municipal ordinance containing requirement discriminating in favor of citizens of the State with reference to rates of transportation to and from a point without the State.

such a restriction is properly to be regarded as upon transportation that may long previously have terminated. In some instances, the restriction held invalid seems to have been rather against a nonresident pro-

For other instances of such invalid discrimination, see *Georgia Packing Co. v. Mayor, etc., of Macon*, 60 Fed. 774, 22 L. R. A. 775 (C. C. Ga., 1893); *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. 258 (C. C. S. D., 1900); *Ex parte Hull*, 153 Fed. 459 (C. C. Ala., 1907); *Vines v. State*, 67 Ala. 73 (Dec. T. 1880); *State v. McGinnis*, 37 Ark. 362 (Nov. T. 1881); *Ex parte Thomas*, 71 Cal. 204, 12 Pac. 53 (1886); *Ames v. People*, 25 Colo. 508, 55 Pac. 725 (1898); *Rodgers v. McCoy*, 6 Dak. 238, 44 N. W. 990 (1889); *Graffty v. City of Rushville*, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128 (1886); *City of Marshalltown v. Blum*, 58 Iowa, 184, 12 N. W. 266, 43 Am. Rep. 116 (1882); *Town of Pacific Junction v. Dyer*, 64 Iowa, 38, 19 N. W. 862 (1884); *State v. Furbush*, 72 Me. 493 (1881); *Rodgers v. Kent Circuit Judge*, 115 Mich. 441, 73 N. W. 381 (1897); *State v. North*, 27 Mo. 464 (1858); *Sinclair v. State*, 69 N. C. 47 (1873); *Albertson v. Wallace*, 81 N. C. 479 (1879); *Commonwealth v. Simons*, 15 Pa. Co. 550 (1894); *State v. Zophy*, 14 S. D. 119, 84 N. W. 391, 86 Am. St. Rep. 741 (1900); *Higgins v. Rinker*, 47 Tex. 381 (1877); *Ex parte Rollins*, 80 Va. 314 (1885); *Commonwealth v. Myer*, 92 Va. 809, 23 S. E. 915, 31 L. R. A. 379 (1896); *Bacon v. Locke*, 42 Wash. 215, 83 Pac. 721 (1906); *Van Buren v. Downing*, 41 Wis. 122 (1876).

See also *Re Brosnahan*, 18 Fed. 62 (C. C. Mo., 1883); *Kohn v. Melcher*, 29 Fed. 433 (C. C. Iowa, 1887); *Spellman v. City of New Orleans*, 45 Fed. 3 (C. C. La., 1891); *Ex parte Brown*, 48 Fed. 435 (D. C. N. C., 1891); *American Harrow Co. v. Shaffer*, 68 Fed. 750 (C. C. Va. 1895); appeal dismissed in 166 U. S. 718, 17 Supm. 991, 41 L. ed. 1187 (1897); *Re Sydow*, 4 Ariz. 207, 36 Pac. 214 (1894); *Weaver v. State*, 89 Ga. 639, 15 S. E. 840 (1892); *Martin v. Town of Rosedale*, 130 Ind. 109, 29 N. E. 410 (1891); *Schmidt v. City of Indianapolis*, 80 N. E. 632 (Supm. Ct. Ind. 1907); *Rash v. Holloway*, 82 Ky. 674 (1885); *Jung Brewing Co. v. Commonwealth*, 98 S. W. 307 (Ct. App. Ky., 1906); *People v. Voorhis*, 131 Mich. 398, 91 N. W. 624 (1902); *Crow v. State*, 14 Mo. 237 (1851); *Grimes v. Eddy*, 126 Mo. 168, 188, 28 S. W. 756, 762, 26 L. R. A. 638, 645, 47 Am. St. Rep. 653 (1894); *City of Buffalo v. Reavey*, 37 App. Div. 228, 55 N. Y. Suppl. 792 (1899); *State v. Long*, 95 N. C. 582, 59 Am. Rep. 263 (1886); *State v.*

ducer or seller than against products of another State, or of a foreign country, and as to such instances the propriety of the application of the commerce clause seems still more doubtful. At least, as to them, it seems more in accordance with reason, that the invalidity be referred to some other constitutional

Stevenson, 109 N. C. 730, 14 S. E. 385, 26 Am. St. Rep. 595 (1891); *Sayre Borough v. Phillips*, 148 Pa. St. 482, 24 Atl. 76, 16 L. R. A. 49, 33 Am. St. Rep. 842 (1892); *State v. Hilleyman*, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567 (1899); *Higgins v. Rinker*, 47 Tex. 393 (1877); *County of Galveston v. Gorham*, 49 Tex. 279 (1878); *Speer v. Commonwealth*, 23 Gratt. (Va.) 935, 14 Am. Rep. 164 (1873).

On this point seem overruled *Sears v. Commissioners of Warren County*, 36 Ind. 267, 10 Am. Rep. 62 (1871); *Davis v. Dashiell*, Phil. Law (N. C.), 114 (1867); *Wynne v. Wright*, 1 Dev. & B. Law (N. C.), 19 (1834).

In *New York State v. Roberts*, 171 U. S. 658, 19 Supm. 58, 43 L. ed. 323 (1898), affirming *People ex rel. Parke, Davis & Co. v. Roberts*, 91 Hun, 158, 36 N. Y. Suppl. 368 (1895), which was affirmed without opinion in 149 N. Y. 608, 44 N. E. 1127 (1896), a statute imposing a tax on all corporations, whether foreign or domestic, doing business in the State was held properly applied to a foreign manufacturing corporation, notwithstanding the objection of discrimination in that there were excepted from the application of the statute manufacturing corporations wholly engaged in carrying on manufacture within the State. It was admitted, however, that such objection might have been valid if the object of such statute was "to impose a tax upon products of other States, while exempting similar domestic goods from taxation." The elaborate dissenting opinion of Harlan, J., seems more in harmony with the established rule.

That the State may, as a proprietor, thus, of lands under water belonging to it, like other proprietors generally, discriminate against nonresidents as to the use thereof, see for instance, *Haney v. Compton*, 36 N. J. Law, 507 (1873).

As to discrimination by carriers between "local freight, and that which is extraterritorial, when it commences its transit," see *Shipper v. Pennsylvania R. R. Co.*, 47 Pa. St. 338 (1864).

As to discrimination under guise of inspection laws, see § 93; in provision for collection of wharfage, § 116. As to intoxicating liquors, see § 98.

provision, thus, that "the citizens of each State shall be entitled to all immunities and privileges of citizens in the several States,"⁹⁰ or to the provision of the Fourteenth Amendment that "no State shall deny to any person within its jurisdiction the equal protection of the laws."⁹¹ But, whatever else may be the effect of discrimination as subject to the application of the commerce clause, it is clear enough that the existence of discrimination in favor of transportation within the State is unnecessary in order to make invalid a restriction upon transportation within the scope of the commerce clause.⁹² It is still more

⁹⁰ It was rather in view of this provision, than of the commerce clause, that in *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449 (Dec. 1870), reversing 31 Md. 279 (1869), a prohibition of sales without a license, by a nonresident, of goods "other than agricultural products and articles manufactured in the State" was held invalid. To similar effect, *Fecheimer v. City of Louisville*, 84 Ky. 306, 2 S. W. 65 (1886); *Daniel v. Trustees of Richmond*, 78 Ky. 542 (1880); *Re Watson*, 15 Fed. 511 (C. C. Vt., 1882). It was applied in holding invalid a discrimination against a nonresident pedler, in *Re Jarvis*, 66 Kan. 329, 71 Pac. 576 (1903).

See also *Territory v. Farnsworth*, 5 Mont. 303, 5 Pac. 869 (1885).

⁹¹ See *New York State v. Roberts*, *supra* (171 U. S. 662, 683, 19 Supm. 60, 77); *State v. Montgomery*, 94 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386 (1900); *State v. Mitchell*, 97 Me. 66, 53 Atl. 887, 94 Am. St. Rep. 481 (1902); *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973 (1898).

⁹² *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Supm. 592, 30 L. ed. 694 (1887); *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 496, 8 Supm. 689, 704, 31 L. ed. 700 (1888). See comments in *Bowman v. Chicago & Northwestern Ry. Co.*, on *Walling v. Michigan*, 116 U. S. 446, 6 Supm. 454, 29 L. ed. 691 (1886). See, however, *Robbins v. Shelby County Taxing District*, as to practical effect of license tax (as in that case upon drummers) in producing discrimination in favor of domestic commerce. Of course, as here pointed out, it was no objection that the tax, if invalid as against drummers from other States, operated as a discrimination against domestic drummers, against whom it was valid.

clear, if possible, that the existence of discrimination in favor of residents of the State, or others, is unnecessary for that purpose.⁹³

The doctrine stated in the text is also sustained by *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. 609, 11 L. R. A. 179 (C. C. N. C., 1890); *Aultman v. Holder*, 68 Fed. 467 (C. C. Mich., 1895); *City of Bloomington v. Bourland*, 137 Ill. 534, 27 N. E. 692, 31 Am. St. Rep. 382 (1891). For decisions favoring a contrary view, see *Ex parte Hanson*, 28 Fed. 127 (D. C. Oreg., 1886); *Re Rudolph*, 2 Fed. 65 (C. C. Nev., 1880); *Ex parte Thornton*, 12 Fed. 538 (C. C. Va., 1882); *State v. Wheelock*, 95 Iowa, 577, 64 N. W. 620, 30 L. R. A. 429, 58 Am. St. Rep. 442 (1895). The point seems to have been overlooked in *Re May*, 82 Fed. 422 (C. C. Mont., 1897).

⁹³ In *Minnesota v. Barber*, 136 U. S. 313, 10 Supm. 862, 34 L. ed. 455 (1890), in holding a statute invalid as discriminating against the products of other States, it was held no answer that it applied to all owners thereof "whether citizens of Minnesota or citizens of other States." To the same effect, *Georgia Packing Co. v. Mayor, etc., of Macon*, 60 Fed. 774, 22 L. R. A. 775 (C. C. Ga., 1893).

CHAPTER IV.

THE POWERS OF THE STATES SPECIFICALLY CONSIDERED.

- SECTION 79. Establishing and maintaining means of transportation.
80. The same; transportation within scope of commerce clause.
81. The same; transportation wholly within State.
82. Ferries.
83. Bridges.
84. Improvements in navigation.
85. Internal improvements; *e. g.*, dams.
86. Control of persons and property.
87. Production, sale, and use of property.
88. Transportation of "article of commerce."
89. Transportation of persons.
90. Power as depending on deleterious quality; *e. g.*, disease in cattle.
91. Prevention of fraud or deception.
- 91a. *Plumley v. Massachusetts.*
92. Prevention of sale of adulterated articles.
93. Inspection.
94. The same; in case of transportation out of State.
95. Quarantine regulations.
96. Transportation of property the subject of common ownership; *e. g.*, game.
97. The same; transportation into State.
98. Transportation of intoxicating liquors.
99. The same; Wilson act.
100. Conduct and liability of those engaged in transportation.
101. The same; regulation for benefit of public; *e. g.*, as to speed of trains; transportation on Sabbath.
102. The same; for benefit of those enjoying benefit of transportation wholly within State; *e. g.*, prescribing qualifications of those engaged in business of transportation.
103. The same; for benefit of those enjoying benefit of transportation within scope of commerce clause.
104. The same; requirements as to stopping trains.
105. Regulation of liability for loss or injury in course of transportation.
106. The same; for failure of duty to transport.
107. Pilotage.

§ 79. Establishing and maintaining means of transportation.

It has already been seen that there are numerous powers reserved to the States that may be exercised, though commerce within the scope of the commerce clause be thereby affected; also that, speaking generally, such powers may be resolved into a few tolerably well-defined classes, one of which is *the power to establish and maintain means of transportation*. It is this important power, as thus affecting such commerce, that is now to be considered in detail.

§ 80. The same; transportation within scope of commerce clause.

According to the view hereinbefore taken, strictly speaking, *in no case can commerce within the scope of the commerce clause be regulated under authority of a State*, that is to say, the power of Congress is exclusive in all cases. And it has been seen that the power of Congress to regulate includes the power to *authorize the establishment and maintenance of means of commercial communication within the scope of the commerce clause*, thus, by a corporation created for that purpose.¹ In this view would seem excluded exercise by the State of authority to authorize the establishment or maintenance of means of such communication, thus by either a corporation of its own creation, or by a foreign corporation.² In any view it seems

¹ See § 47.

² The contrary seems to have been generally assumed, but the power to confer such authority, thus upon a corporation of its own creation, has commonly been referred to the rule of comity established in *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274 (Jan. T. 1839).

In *Railroad Co. v. Harris*, 12 Wall. 65, 81, 20 L. ed. 354 (Dec. 1870), for instance, this rule was applied to the Baltimore & Ohio Railroad Co., originally incorporated in Maryland and operating extensively through several States. With reference to its

beyond the power of the State to authorize *mere transportation* within the scope of the commerce clause, though, as we shall presently see, a contrary view is not without support in decisions of the Supreme Court. The view here contended for seems an inevitable conclusion from what we have seen to be the established general rule that *no restriction, by way of prohibition or otherwise, may be validly imposed under the authority of a State upon transportation within the scope of the commerce clause.*³ If now the State is without power to impose any restriction upon such transportation, it is hard to see how any authority can be derived from the State to engage therein. If it has any power to authorize the establishment and maintenance of means of such transportation, it would seem to be by way of, not, indeed, authorizing *transportation merely*, but of authorizing exercise of the power of eminent domain or other special privilege. It seems to require no authority from the State to transport into it by means of a stage coach, but if the proprietor of the stage coach proposes to substitute therefor a railroad car he needs to exercise the power of eminent domain; and to that extent it may be conceded that it is within the power of the State to authorize the establishment and maintenance of means of transportation, that is, by railroad. There is here assumed that it is absolutely within the power of the State to withhold the right to exercise the power of eminent domain, but we have previously suggested doubts as to its power to withhold such right, in so far as necessary for the power to operate in Virginia, it was said that in what it did in that State "the same principle is involved as in the transactions" under consideration in *Bank of Augusta v. Earle*, it seemingly never occurring to any one concerned in the case that the effect of the commerce clause was involved. But it would be superfluous to furnish additional citations on this point.

³ See § 69.

poses of transportation within the scope of the commerce clause.⁴

§ 81. The same; transportation wholly within State.

There can, of course, be no doubt that, so far as the commerce clause is concerned, a State has, generally speaking, ample power to authorize the establishment and maintenance of means of transportation wholly within its limits. As will presently be seen in detail, the principal difficulty in this regard has been as to the effect of such authority from a State, in so far as the authorized line of communication intersects a stream or other navigable water of the United States. There has thus far been little occasion to consider the effect of such authority in case of a line intersecting or otherwise interfering with a line of communication by land authorized by Congress. In the nature of things there seems to be no essential distinction in this respect between interference with transportation by land and with transportation by water, but we here confine our attention to the latter class of cases, as to which the question has commonly arisen.

§ 82. Ferries.

A ferry is defined as "a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation of passengers, or of travelers with their teams and vehicles and such other property as they may carry or have with them."⁵ Obviously a ferry is a means of transportation, and when transportation thereby is between a point within and one without the State, it seems clear enough that

⁴ See § 66.

⁵ *St. Clair County v. Interstate Sand & Car Transfer Co.*, *infra*, quoting from *Mayor, etc., of N. Y. v. Starin*, 106 N. Y. 1, 11, 12 N. E. 631, 632 (1887). And see *Broadnax v. Baker*, 94 N. C. 675, 55 Am. Rep. 633 (1886).

it constitutes what is strictly transportation within the scope of the commerce clause. So far as the commerce clause is concerned, there seems to be no objection, any more than in the case of bridges, to a State authorizing, or imposing restrictions upon, the maintenance of a ferry, though across a stream or other navigable water of the United States, but solely as a means of transportation wholly within the State, whether or not such stream is wholly within the limits of the State.⁶ But as to a ferry over a navigable water that is a boundary between two States, it would seem, as in case of bridges, that if the State has any authority it is by way of not, indeed, authorizing *transportation merely* by means of the ferry, but of authorizing exercise of the power of eminent domain or other special privilege. But the exercise of the power of eminent domain, for instance, seems ordinarily less necessary for the purpose of transportation by ferry than by bridge, and, apart from the exercise of such special privilege, it seems to follow that as the State is without power to impose any restriction upon transportation by ferry that is within the scope of the commerce clause,⁷ so (whether or not it be within the power of the State to grant a *nonexclusive* ferry franchise) it is

⁶ See *Gloucester Ferry Co. v. Pennsylvania*, *infra* (114 U. S. 215, 5 Supm. 834), where the language of Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. ed. 23 (1824), was explained as limited to "ferries entirely within the State." See also (114 U. S. 216, 5 Supm. 834) as to ferry between a State and a foreign country.

See also *Chiapella v. Brown*, 14 La. Ann. 189 (1859).

⁷ As to such restriction held invalid in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Supm. 826, 29 L. ed. 158 (1885), see § 108. As to regulation of rates of ferriage, see § 67.

See also as to application of commerce clause to transportation by ferry, *The Cheeseman v. Two Ferryboats*, 2 Bond, 363, 5 Fed. Cas. No. 2,633 (1870); *U. S. v. Jackson*, 26 Fed. Cas. No. 15,458 (C. C. N. Y., 1841).

beyond its power to grant an *exclusive* ferry franchise between points, one within, and the other out of, the State.⁸ It is hard to see how any case could more

⁸ But the view that authority can be so derived from the State finds support in *Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191 (Dec. T. 1861), affirming *City of Newport v. Taylor*, 16 B. Mon. (Ky.) 699 (1856), a decision that has produced much confusion, though *St. Clair County v. Interstate Sand & Car Transfer Co.*, *infra*, goes far toward overthrowing its authority and establishing a sound view of the application of the commerce clause to transportation by ferry. In *Conway v. Taylor* was sustained a Kentucky statute granting a ferry franchise across the Ohio River, even as against interference by a vessel enrolled and licensed under legislation by Congress. *Conway v. Taylor* was applied in sustaining such grants under State authority, in *Burlington & Henderson County Ferry Co. v. Davis*, 48 Iowa, 133, 30 Am. Rep. 390 (1878); *Marshall v. Grimes*, 41 Miss. 27 (1866); *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884 (1891); 110 Mo. 557, 19 S. W. 809 (1892); *City of St. Louis v. Waterloo-Carondelet Turnpike, etc., Co.*, 14 Mo. App. 216 (1883, sustaining imposition of conditions upon grant of franchise). And so as to ferries to points in other countries in *Chilvers v. People*, 11 Mich. 43 (1862, sustaining requirement of license); *People v. Babcock*, 11 Wend. (N. Y.) 586 (1834); *Tugwell v. Madison & Eagle Pass Ferry Co.*, 74 Tex. 480, 9 S. W. 120, 13 S. W. 654 (1888).

See *Texas & P. Ry. Co. v. City of Baton Rouge*, 36 Fed. 845 (C. C. La., 1888); *U. S. v. The William Pope*, Newb. 256, 28 Fed. Cas. No. 16,703 (1852); *City of Madison v. Abbott*, 118 Ind. 337, 21 N. E. 28 (1889); *U. S. v. Fanning*, 1 Morris (Iowa), 348 (1844); *Phillips v. Town of Bloomington*, 1 G. Greene (Iowa), 498 (1848); *Cauble v. Craig*, 94 Mo. App. 675, 69 S. W. 49 (1902); *Midland Terminal & Ferry Co. v. Wilson*, 28 N. J. Eq. 537 (1877).

As to effect of ferry landing being in Indian reservation, see *Nixon v. Reid*, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315 (1896).

It would seem clear enough that, save as a matter of comity, the grant cannot operate in another State, so as to, for instance, give the right to land, or transport from shore therein. See *Weld v. Chapman*, 2 Iowa, 524 (1856); *Burlington & Henderson County Ferry Co. v. Davis*, 48 Iowa, 133, 30 Am. Rep. 390 (1878).

completely come within the description of what we have seen to be an invalid restriction upon transportation within the scope of the commerce clause. If, however, the power of a State, with reference to a ferry, constitute an exception to what has been seen to be the general rule, it seems established that the scope of such exception is limited to the case of transportation by ferry in a strict technical sense, that is, regarded as merely an agency for the transportation of persons with or without their property, and is distinguished from transportation generally within the scope of the commerce clause, thus, of railroad cars across a navi-

In *State v. Faudre*, 54 W. Va. 122, 46 S. E. 269, 63 L. R. A. 877, 102 Am. St. Rep. 927 (1903), however, was denied the power under the authority of a State to fix charges for transportation by ferry across the Ohio River, such ferry being authorized by the State of Ohio. See also as to effect of grant by one State only, *Challiss v. Davis*, 56 Mo. 25 (1874); *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. Law, 39 (1875).

In *Fanning v. Gregoire*, 16 How. 524, 14 L. ed. 1043 (Dec. T. 1853), a grant by the Territory of Iowa of the right to operate a ferry across the Mississippi River was held not exclusive so as to prevent a subsequent like grant. See as to effect of ordinance of 1787. *Fanning v. Gregoire* and *Conway v. Taylor* seem to have been relied on in *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 2 Supm. 257, 27 L. ed. 419 (1883), affirming 102 Ill. 560 (1882), which may, however, be sustainable on the distinct ground of the jurisdiction of a State to tax property employed in transportation within the scope of the commerce clause. See § 112. Compare as to same ferry *Mills v. St. Clair County*, 8 How. 569, 12 L. ed. 1201 (Jan. T. 1850), affirming 7 Ill. 197 (1845).

In *St. Clair County v. Interstate Sand & Transfer Co.*, *infra*, it was regarded as unnecessary to decide whether the view supported in *Fanning v. Gregoire* and *Conway v. Taylor* had not been modified by the rule laid down in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Supm. 826, 29 L. ed. 158 (1883); *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Supm. 1087, 38 L. ed. 962 (1894). On this point *Gloucester Ferry Co.* was distinguished at length in *Carroll v. Campbell*, *supra*, as not overruling *Fanning v. Gregoire* or *Conway v. Taylor*.

gable stream;⁹ but this distinction seems rather unsubstantial.

§ 83. Bridges.

It has already been seen that Congress, in the exercise of its unquestionable power "to prevent any and all obstructions to navigation," has made the construction of bridges over navigable waters of the United States subject to prescribed conditions.¹⁰ It is then of comparatively little practical importance to determine what would, in the absence of such legislation, be the power of a State to authorize the construction and maintenance of bridges over such waters. It is established, however, that, so far as the commerce clause is concerned, a State, in the absence of such action by Congress, may authorize the construction and maintenance of such a bridge.¹¹ And in case of construction

⁹ Thus in *St. Clair County v. Interstate Sand & Car Transfer Co.*, 192 U. S. 454, 24 Supm. 300, 48 L. ed. 518 (1904. See previous decision in 109 Fed. 741 [C. C. Ill., 1901]), was held invalid the requirement of a license for transportation of railroad cars across the Mississippi between Illinois and Iowa. Such license was to be granted preferably to a citizen of the State of Illinois; and the acceptance of the license imposed the absolute obligation upon the applicant to carry on a technical ferry business to operate at designated hours during the day and during the entire night.

¹⁰ See § 48.

¹¹ *Cardwell v. American Bridge Co.*, 113 U. S. 205, 5 Supm. 423, 28 L. ed. 959 (1885), affirming 19 Fed. 562 (C. C. Cal., 1884). Thus over the East River, connecting New York and Brooklyn, there being in addition, however, direct authorization by act of Congress. *Miller v. Mayor of N. Y.*, 109 U. S. 385, 3 Supm. 228, 27 L. ed. 971 (1883), affirming 10 Fed. 513 (C. C. N. Y., 1880). See previous decision in 13 Blatchf. 469, 17 Fed. Cas. No. 9,585 (1876). So over the Schuylkill River in Pennsylvania, at Philadelphia, there navigable for vessels drawing from eighteen to twenty feet of water. So held, though such bridge, not more than thirty feet high, somewhat impeded navigation, so that vessels without masts could not pass. *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96 (Dec. 1865). See *Flanagan v. City of*

over a stream, it makes no difference whether or not such stream is wholly within the limits of the State.¹²

Philadelphia, 42 Pa. St. 219 (1862), involving same state of facts. See *Devoe v. Penrose Ferry Bridge Co.*, 7 Fed. Cas. No. 3,845 (C. C. Pa., 1854).

For various instances of State legislation sustained as authorizing the construction and maintenance of such a bridge, see *The Passaic Bridges (Milnor v. N. J. R. R. Co.)*, 3 Wall. 782 (Appendix), 17 Fed. Cas. No. 9,620 (C. C. N. J., 1857); affirmed by a divided court and without opinion as stated in 3 Wall. 721, 794; *Pennsylvania R. R. Co. v. N. Y. & L. B. R. R. Co.*, 19 Fed. Cas. No. 10,953 (C. C. N. J., 1873); *Scheurer v. Columbia-Street Bridge Co.*, 27 Fed. 172 (C. C. Oreg., 1886); *Bailey v. Philadelphia, Wilmington, etc., R. R. Co.*, 4 Harr. (Del.) 389, 44 Am. Dec. 593 (1846); *Williams v. Beardsley*, 2 Ind. 591 (1851); *Green & Barren River Nav. Co. v. Chesapeake, Ohio, etc., R. R. Co.*, 88 Ky. 1, 10 S. W. 6, 2 L. R. A. 540 (1888); *State v. Leighton*, 83 Me. 419, 22 Atl. 380 (1891); *Adams v. Ulmer*, 91 Me. 47, 39 Atl. 347 (1897); *Commissioners of Talbot County v. Commissioners of Queen Anne's County*, 50 Md. 245 (1879); *Commonwealth v. Breed*, 4 Pick. (Mass.) 460 (1827); *Commonwealth v. Proprietors of New Bedford Bridge*, 2 Gray (Mass.), 339 (1854); *Commonwealth v. Inhabitants of Taunton*, 7 Allen (Mass.), 309 (1863); *Dover v. Portsmouth Bridge*, 17 N. H. 200 (1845); *Lister v. Newark Plank Road Co.*, 36 N. J. Eq. 477 (1883); *People v. Rensselaer & Saratoga R. R. Co.*, 15 Wend. (N. Y.) 113, 30 Am. Dec. 33 (1836); *Hutchinson v. Thompson*, 9 Ohio, 52 (1839); *Commissioners v. Board of Public Works*, 39 Ohio St. 628 (1884).

See, generally, *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311 (Dec. T. 1862); *U. S. v. New Bedford Bridge*, 1 Woodb. & M. 401, 27 Fed. Cas. No. 15,867 (1847); *Commissioners of St. Joseph County v. Pidge*, 5 Ind. 13 (1854); *Northern Pac. R. R. Co. v. Barnesville & M. R. R. Co.*, 4 Fed. 172 (C. C. Minn., 1880); *Peters v. New Orleans, etc., R. R. Co.*, 56 Ala. 528 (Dec. T. 1876).

In *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Supm. 185, 27 L. ed. 442 (1883), affirming 12 Fed. 777 (C. C. Ill., 1882), was sustained a municipal ordinance imposing restrictions upon the opening of bridges across the Chicago River. To similar effect, *City of Chicago v. McGinn*, 51 Ill. 266 (1869).

¹² Thus of a bridge wholly in Kentucky over the Cumberland River, flowing both in that State and in Tennessee. *Rhea v. New-*

It is not so clear that it has such authority as to a bridge constructed over navigable water, that is, like the Mississippi River, a boundary between two States.¹³ Applying what has just been suggested, it would seem that if it has any authority in such a case it is by way of not, indeed, authorizing *transportation merely* by means of the bridge, but of authorizing exercise of the power of eminent domain or other special privilege. There is an obvious convenience in such power of authorization residing in the States, which are said to be "more likely to appreciate the importance of these means of internal communication and to provide for their proper management, than a government at a distance."¹⁴ It seems clear that it is no objection to the establishment and maintenance of such a bridge that it *somewhat* impedes navigation,¹⁵ even by vessels enrolled and licensed under Congressional legislation.¹⁶ It seems not clearly established, however, that there would be likewise authorized the establishment and maintenance of a bridge that would *wholly* prevent,

port, N. & M. V. R. R. Co., 50 Fed. 16 (C. C. Ky., 1892). So of a bridge over the Tombigbee River, "an interstate stream." *Kansas City, Memphis & Birmingham R. R. Co. v. Wiiggul*, 82 Miss. 223, 33 So. 965, 61 L. R. A. 578 (1903).

¹³ That it has seems to have been assumed in *Gilman v. Philadelphia*. See note 19, *infra*. Compare as to ferries § 82. In *Dover v. Portsmouth Bridge*, 17 N. H. 200 (1845), the bridge held validly authorized was across water between two States by virtue of concurrent legislation of each.

¹⁴ *Cardwell v. American Bridge Co.*, *supra*; *Escanaba Co. v. Chicago*, *supra*.

¹⁵ See *Gilman v. Philadelphia*, *supra*; *Scheurer v. Columbia-Street Bridge Co.*, 27 Fed. 172 (C. C. Oreg., 1886); *Green & Barron River Nav. Co. v. Chesapeake, Ohio, etc., R. R. Co.*, 88 Ky. 1, 10 S. W. 6, 2 L. R. A. 540 (1888).

¹⁶ *Gilman v. Philadelphia*, *supra*, citing *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. ed. 412 (Jan. T. 1829).

or even materially obstruct, delay, or hinder navigation.¹⁷ But, in accordance with the doctrine already

¹⁷ Compare as to dams § 85. The propriety of relief by injunction against the erection of a bridge across the Hudson River at Albany as obstructing navigation, was much discussed in *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. 395, 22 Fed. Cas. No. 12,852 (1859), where the court was divided, as it was in 1 Black, 582, 17 L. ed. 81 (Dec. T. 1861), on certificate of division of opinion. A decree dismissing the bill in this case in *Coleman v. Hudson River Bridge Co.*, 5 Blatchf. 56, 6 Fed. Cas. No. 2,983 (1862), was affirmed by a divided court in *Albany Bridge Case*, 2 Wall. 403, 17 L. ed. 876 (Dec. 1864), without expression of opinion on any point. See *Hazard v. Hudson River Bridge Co.*, 27 How. Pr. (N. Y.) 296 (Supm. Ct., Albany Sp. T., 1863).

In *Silliman v. Troy & W. T. Bridge Co.*, 11 Blatchf. 274, 22 Fed. Cas. No. 12,853 (1873), was denied relief against the erection of a bridge (across the Hudson River at Troy), that it appeared "would not materially obstruct or hinder the commerce upon the Hudson River at or above Troy." The opinion contains an elaborate discussion of authorities. In *The Passaic Bridges (Milnor v. N. J. R. R. Co.)*, 3 Wall. 782 (Appendix), 17 Fed. Cas. No. 9,620 (C. C. N. J., 1857); affirmed by a divided court (see 3 Wall. 721, 794), was denied relief against the erection of a bridge across the Passaic River. See discussion of the effect of this decision and of *Gilman v. Philadelphia* in *Silliman v. Troy & W. T. Bridge Co.* A preliminary injunction against the construction of such a bridge was allowed in *Baird v. Shore Line Ry. Co.*, 6 Blatchf. 276, 2 Fed. Cas. No. 758 (1868).

As to liability for injury caused by bridge that obstructs navigation, see *Jolly v. Terre Haute Draw-Bridge Co.*, 6 McLean, 237, 3 Fed. Cas. No. 7,441 (1853); *The Nonpareil*, 149 Fed. 521 (D. C. N. Y., 1905); *Railroad v. Ferguson*, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908 (1900); *Oregon City Transp. Co. v. Columbia St. Bridge Co.*, 53 Fed. 549 (D. C. Oreg., 1892); *Little Rock, Mississippi River, etc., R. R. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277 (Nov. T. 1882); *Sweeney v. Chicago, Milwaukee & St. Paul Ry. Co.*, 60 Wis. 60, 18 N. W. 756 (1884); *Illinois River Packet Co. v. Peoria Bridge Assoc.*, 38 Ill. 467 (1865).

As to right of riparian owner to damages, see *Bailey v. Philadelphia, Wilmington, etc., R. R. Co.*, 4 Harr. (Del.) 389, 44 Am. Dec. 593 (1846).

considered, that the exercise of the power of Congress to regulate commerce must exclude the exercise of any conflicting power under authority of a State, "when Congress acts directly¹⁸ with reference to the bridges authorized by the State, its will must control so far as may be necessary to secure the free navigation of the streams."¹⁹ The legislation just referred

¹⁸ That such interference must be direct, see *Escanaba Co. v. Chicago*, *supra*; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 13, 8 Supm. 811, 817, 31 L. ed. 629 (1888), as to effect of certain expenditures under appropriations by Congress. As to effect of creation of port of entry, see *Willamette Iron Bridge Co. v. Hatch*; *The Passaic Bridges*, *infra*; *Gilman v. Philadelphia*, *supra*.

¹⁹ *Cardwell v. American Bridge Co.*, *supra*. The principle was also recognized in *Miller v. Mayor of N. Y.*, *supra*; *Escanaba Co. v. Chicago*, *supra*. In *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96 (Dec. 1865), the decision in *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 14 L. ed. 249 (Dec. T. 1851), holding unlawful the construction of a bridge across the Ohio River under State authority, was explained as resting on the ground that Congress had acted upon the subject in regulating the navigation of the river, thereby securing to the public the free and unobstructed use of the same. See also *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Supm. 811, 31 L. ed. 629 (1888); *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. 395, 22 Fed. Cas. No. 12,852 (1859). But see *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 15 L. ed. 435 (Dec. T. 1855), as to act of Congress legalizing such bridge. As to a similar act legalizing a bridge over the Mississippi River, see *The Clinton Bridge*, 10 Wall. 454, 19 L. ed. 969 (Dec. 1870), affirming 1 Woolw. 150, 5 Fed. Cas. No. 2,900 (1867). As to withdrawal by Congress of assent, see *Bridge Co. v. U. S.*, 105 U. S. 470, 26 L. ed. 1143 (Oct. 1881).

No objection to authorization of such a bridge by a State was held furnished by the provision in the ordinance of 1787 for government of the Northwest Territory that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free," etc. *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Supm. 185, 27 L. ed. 442 (1883), affirming 12 Fed. 777 (C. C. Ill., 1882). And so of like provisions in statutes for admission of States, the pro-

to furnishes instances of the exercise of such power.

§ 84. Improvements in navigation.

It has been seen that the power of Congress to regulate navigation includes the power to effectuate im-

hibition being not of physical obstructions and impediments to navigation, but "only the imposition of duties for the use of the navigation, and any discrimination denying to citizens of other States the equal right to such use." *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Supm. 811, 31 L. ed. 629 (1888), reversing *Wallamet Iron Bridge Co. v. Hatch*, 19 Fed. 347 (C. C. Oreg., 1884); previous decision in 6 Fed. 326 (C. C. Oreg., 1881). To like effect, *Cardwell v. American Bridge Co.*, 113 U. S. 205, 5 Supm. 423, 28 L. ed. 959 (1885), affirming 19 Fed. 562 (C. C. Cal., 1884); *Hamilton v. Vicksburg, etc., R. R. Co.*, 119 U. S. 280, 7 Supm. 206, 30 L. ed. 393 (1886), affirming 34 La. Ann. 970, 44 Am. Rep. 451 (1882).

See also as to effect of such provisions *Withers v. Buckley*, 20 How. 84, 15 L. ed. 816 (Dec. T. 1857); *Columbus Ins. Co. v. Peoria Bridge Assoc.*, 6 McLean, 70, 6 Fed. Cas. No. 3,046 (1853); *Columbus Ins. Co. v. Curtenius*, 6 McLean, 209, 6 Fed. Cas. No. 3,045 (1853); *Jolly v. Terre Haute Draw-Bridge Co.*, 6 McLean, 237, 13 Fed. Cas. No. 7,441 (1853); *Palmer v. Cuyahoga County*, 3 McLean, 226, 18 Fed. Cas. No. 10,688 (1843); *Spooner v. McConnell*, 1 McLean, 337, 22 Fed. Cas. No. 13,245 (1838); *Woodman v. Kilbourn Manuf. Co.*, 1 Biss. 546, 30 Fed. Cas. No. 17,978 (1867); *Scheurer v. Columbia-Street Bridge Co.*, 27 Fed. 172 (C. C. Oreg., 1886); *People v. Potrero & Bay View R. R. Co.*, 67 Cal. 166, 7 Pac. 445 (1885); *Illinois River Packet Co. v. Peoria Bridge Assoc.*, 38 Ill. 467 (1865); *Williams v. Beardsley*, 2 Ind. 591 (1851); *Depew v. Trustees of Wabash & Erie Canal*, 5 Ind. 8 (1854); *Neaderhouser v. State*, 28 Ind. 257 (1867); *Boykin v. Shaffer*, 13 La. Ann. 129 (1858); *Egan v. Hart*, 45 La. Ann. 1358, 14 So. 244 (1893); *Hogg v. Zanesville Canal, etc., Co.*, 5 Ohio, 410 (1832); *Hutchinson v. Thompson*, 9 Ohio, 52 (1839); *Commissioners v. Board of Public Works*, 39 Ohio St. 628 (1884); *La Plaisance Bay Harbor Co. v. City of Monroe*, Walk. Ch. (Mich.) 155 (1843); *Sweeney v. Chicago, Milwaukee & St. Paul Ry. Co.*, 60 Wis. 60, 18 N. W. 756 (1884); *J. S. Keator Lumber Co. v. St. Croix Boom Co.*, 72 Wis. 62, 80, 38 N. W. 529, 535, 7 Am. St. Rep. 837, 847 (1888).

provements therein. Likewise, the power of a State to regulate navigation wholly within its territory may be assumed to include the power to effectuate improvements therein. It is obvious that improvements so effectuated by the State may frequently operate for the benefit of those engaged in transportation within the scope of the commerce clause, and *vice versa*, so that a given improvement may be equally within the power of Congress and of a State, thus, an improvement in navigation of a stream that furnishes means of not only transportation within the scope of the commerce clause, but transportation wholly within the State. It is settled then that, apart from the effect of the legislation presently to be considered, and, so far as the commerce clause is concerned, it is within the power of a State to authorize the improvement of navigable waters of the United States within its limits, thus by the removal of obstructions or deepening the channel.²⁰ This is so, at any rate, in so far as such

²⁰ Thus in *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. ed. 238 (Oct. 1880), of improvement of "the river, bay, and harbor of Mobile." So in *Sands v. Manistee River Improvement Co.*, 123 U. S. 288, 8 Supm. 113, 31 L. ed. 149 (1887), affirming *Manistee River Improvement Co. v. Sands*, 53 Mich. 593, 19 N. W. 199 (1884), of a river wholly within the State. See as to same legislation *Benjamin v. Manistee River Improvement Co.*, 42 Mich. 628, 4 N. W. 483 (1880). To like effect, *Nelson v. Cheboygan Nav. Co.*, 44 Mich. 7, 5 N. W. 998, 38 Am. Rep. 222 (1880). See also *Lindsay & Phelps Co. v. Mullen*, *infra*; *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, 329, 13 Supm. 622, 627, 37 L. ed. 463 (1893).

The power of the State to authorize improvements in navigation was also sustained in *Commissioners of Sinking Fund v. Green & Barren River Navigation Co.*, 79 Ky. 73 (1880); *Carondelet Canal, etc., Co. v. Parker*, 29 La. Ann. 430, 29 Am. Rep. 339 (1877).

As to establishment of harbor lines, see *Prosser v. Northern Pacific R. R.*, 152 U. S. 59, 14 Supm. 528, 38 L. ed. 352 (1894);

water constitutes a means of transportation wholly within the State. But, as in case of construction and maintenance of bridges under the authority of a State, the exercise of the power of Congress must exclude the

determination of line for wharves, *Mayor, etc., of Savannah v. State*, 4 Ga. 26 (1848).

See, generally, as to power of State, *Veazie v. Moor*, 14 How. 568, 14 L. ed. 545 (Dec. 1852); *Boykin v. Shaffer*, 13 La. Ann. 129 (1858); *Commissioners of Escambia County v. Board of Pilot Commrs.*, 42 So. 697 (Supm. Ct. Fla., 1906).

As to concurrent jurisdiction over waters constituting boundary between States, see *J. S. Keator Lumber Co. v. St. Croix Boom Co.*, 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837 (1888).

As to prohibition of obstruction see *Cox v. State*, 3 Blackf. (Ind.) 193 (1833).

That a riparian owner is not, as a rule, entitled to compensation for damages caused by diversion of water by such improvements, see *Black River Improvement Co. v. La Crosse Booming, etc., Co.*, 54 Wis. 659, 11 N. W. 443, 41 Am. Rep. 66 (1882), and decisions there cited. See also as to compensation for damages caused by such improvements, *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. ed. 557 (Dec. 1871); *Manigault v. Springs*, 199 U. S. 473, 26 Supm. 127, 50 L. ed. 274 (1905); *Lane v. Harbor Commrs.*, 70 Conn. 685, 40 Atl. 1058 (1898); *Lane v. Smith*, 71 Conn. 65, 41 Atl. 18 (1898); *Brooks v. Cedar Brook, etc., Improvement Co.*, 82 Me. 17, 19 Atl. 87, 7 L. R. A. 460, 17 Am. St. Rep. 459 (1889); *La Plaisance Bay Harbor Co. v. City of Monroe*, Walk. Ch. (Mich.) 155 (1843); *Commissioners of Homochitto River v. Withers*, 29 Miss. 21, 64 Am. Dec. 126 (1855); affirmed in *Withers v. Buckley*, 20 How. 84, 15 L. ed. 816 (Dec. T. 1857); *Zimmerman v. Union Canal*, 1 Watts & S. (Pa.) 346 (1841); *Bigham v. Port Arthur Canal, etc., Co.*, 97 S. W. 686 (Supm. Ct. Tex., 1906), reversing 91 S. W. 848 (Tex. Civ. App. 1905).

As to compensation for improvements authorized by Congress, see § 51.

That there rests upon the State no duty to an individual to remove obstructions to navigation, see *Coonley v. City of Albany*, 132 N. Y. 145, 30 N. E. 382 (1892). But see as to granting relief against such obstruction on application of the State, *People v. City of St. Louis*, 10 Ill. 351, 48 Am. Dec. 339 (1848).

exercise of any conflicting power under authority of a State. That is to say, the validity of the exercise of such authority by the State rests on the supposition that the free navigation of such waters, "as permitted under the laws of the United States, is not impaired," and that "any system for the improvement of their navigation provided by the general government is not defeated."²¹ It has already been seen that Congress

²¹ *Sands v. Manistee River Improvement Co.*, *supra*. To the same effect, *County of Mobile v. Kimball*, *supra*. See also *Wisconsin v. Duluth*, 96 U. S. 379, 387, 24 L. ed. 668 (Oct. 1877). Thus in *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, 335, 13 Supm. 622, 630, 37 L. ed. 463 (1893), was sustained the power of Congress in providing for the improvement of navigation, to compel the removal of a lock and dam constructed under authority of a State. That a mere appropriation by Congress for improvement of a navigable water does not constitute such an assumption of jurisdiction as to prevent the State from legislating on the subject, see *U. S. v. Bellingham Bay Boom Co.*, 176 U. S. 211, 20 Supm. 343, 44 L. ed. 437 (1900), reversing 81 Fed. 658, 26 C. C. A. 547 (9th C. 1897); 72 Fed. 585 (C. C. Wash., 1896); *U. S. v. Beef Slough, etc., Co.*, 8 Biss. 421, 24 Fed. Cas. No. 14,559 (1879). See also *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Supm. 811, 31 L. ed. 629 (1888); *Corrigan Transit Co. v. Sanitary District of Chicago*, 137 Fed. 851, 70 C. C. A. 381 (7th C. 1905), affirming 125 Fed. 611 (D. C. Ill., 1903); *Stockton v. Powell*, 29 Fla. 1, 42, 10 So. 688, 693, 15 L. R. A. 42, 47 (1892).

As to relief by injunction on application of Federal government to protect improvements as against action under authority of State, see *U. S. v. Duluth*, 1 Dill. 469, 25 Fed. Cas. No. 15,001 (1871); *U. S. v. Louisville & P. Canal Co.*, 4 Dill. 601, 26 Fed. Cas. No. 15,633 (1873).

As with bridges (see § 83) it seems clear that no objection to such improvement is furnished by a provision in the ordinance for government of the Northwest Territory or like provisions in statutes for admission of States. See *Huse v. Glover*, 119 U. S. 593, 7 Supm. 313, 30 L. ed. 487 (1886), affirming 15 Fed. 292 (C. C. Ill., 1883), and decisions cited under § 83.

has made the placing of certain obstructions in navigable waters subject to prescribed conditions, the effect of which should be considered in determining whether a given improvement is within the authority of a State.²² It is within the power of the State, as in case of wharfage, to impose or authorize the imposition, even upon those engaged in transportation within the scope of the commerce clause, of a reasonable charge for the use of an improvement in navigation to meet the cost thereof.²³

²² See § 48. That, notwithstanding section 19 of the act of March 3, 1899 (30 Stat. L. 1154), conferring authority upon the Secretary of War as to removal of obstructions, there remains power in the States to remove them in the absence of action by the Secretary, see *Hagan v. City of Richmond*, 104 Va. 723, 52 S. E. 385, 3 L. R. A. N. S. 1120 (1905). See also as to extent of authority remaining in States, notwithstanding legislation by Congress on this subject, *City of Milwaukee v. Gimbel*, 130 Wis. 31, 110 N. W. 7 (1906). As to effect of R. S., § 5254, as to certain structures in Mississippi River, in superseding State legislation, see *Railway Co. v. Renwick*, 102 U. S. 180, 26 L. ed. 51 (Oct. 1880).

²³ Thus such a charge was sustained in *Sands v. Manistee River Improvement Co.*, *supra*. So in *Lindsay & Phelps Co. v. Mullen*, 176 U. S. 126, 148, 154, 20 Supm. 325, 333, 335, 44 L. ed. 400 (1900), under legislation giving the right to boom companies to take possession of logs floating down a stream, and requiring that they be inspected and sealed under the supervision of a State official. So held as to logs coming into the Mississippi River out of a river wholly within the limits of another State. See also *Hospes v. O'Brien*, 24 Fed. 145 (C. C. Minn., 1885). But in *Harman v. Chicago*, 147 U. S. 396, 13 Supm. 306, 37 L. ed. 216 (1893), reversing 140 Ill. 374, 29 N. E. 732 (1892), a municipal ordinance requiring a license, being invalid as a restriction upon transportation within the scope of the commerce clause (see § 72), was held not sustainable as a charge for compensation for expenditures in improvement of navigation.

For other instances of such charges being sustained, see *McReynolds v. Smallhouse*, 8 Bush (Ky.), 447 (1871); *Commissioners of Sinking Fund v. Green & Barren River Navigation*

§ 85. Internal improvements; e. g., dams.

A striking illustration of valid exercise of a power reserved to the States, though incidentally affecting commerce within the scope of the commerce clause, is exercise of the power to authorize internal improvements, though substantially, and even wholly, obstructing navigation. The extent of power in this respect seems not to have been very precisely defined, but is conspicuously illustrated in sustaining authorization of dams, thus, for the purpose of reclaiming swampy and overflowed lands.²⁴ But, as said with

Co., supra; Carondelet Canal, etc., Co. v. Parker, supra; Morris v. State, 62 Tex. 728, 738 (1884); *Wisconsin River Improvement Co. v. Manson*, 43 Wis. 255, 28 Am. Rep. 542 (1877).

Such charges may be imposed, not only by the State directly, but by a corporation authorized by the State to make the improvements. See, for instance, *Kellogg v. Union Co.*, 12 Conn. 7 (1837); *Thames Bank v. Lovell*, 18 Conn. 500, 46 Am. Dec. 332 (1847); also other decisions *supra*.

See also *Duluth Lumber Co. v. St. Louis Boom, etc., Co.*, 17 Fed. 419 (C. C. Minn., 1883); *Huse v. Glover*, 15 Fed. 292 (C. C. Ill., 1883); affirmed in 119 U. S. 543, 7 Supm. 813, 30 L. ed. 487 (1886).

As to distinction between such a charge and a tax invalid as interference with commerce, see *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 214, 5 Supm. 826, 833, 29 L. ed. 158 (1885).

²⁴ Thus in *Manigault v. Springs*, 199 U. S. 473, 26 Supm. 127, 50 L. ed. 274 (1905), affirming *Manigault v. Ward*, 123 Fed. 707 (C. C. S. C., 1903), was sustained the construction of a dam for such purpose across a navigable stream. Here was applied *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. ed. 412 (Jan. T. 1829), sustaining the construction for a like purpose of a dam across a navigable creek in the nature of a highway, whereby the navigation thereof was obstructed. To like effect, *Sinnickson v. Johnson*, 17 N. J. Law, 129, 152, 34 Am. Dec. 184, 193 (1839). See criticism of *Wilson v. Black Bird Creek Marsh Co.* in *Silliman v. Troy & W. T. Bridge Co.*, 11 Blatchf. 274, 22 Fed. Cas. No. 12,853 (C. C. N. Y., 1873). See also introduction to Cotton's Constitutional Decisions of John Marshall.

In *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525 (Oct. 1877),

reference to improvements in navigation, the exercise of power of the State in this respect is now subject to

was followed *Willson v. Black Bird Creek Marsh Co.* in sustaining construction of a dam and a boom, for the purpose, it would seem, of developing the utility of the stream as an outlet for lumber, etc. So held though such structures constituted "a material obstruction to the general navigation of the river." To like effect, *Heerman v. Beef Slough Manuf. Co.*, 1 Fed. 145 (C. C. Wis., —), So in *J. S. Keator Lumber Co. v. St. Croix Boom Co.*, 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837 (1888), of boom. See also *Morgan v. King*, 18 Barb. (N. Y.) 277 (1854). In *Delaware & Hudson Canal Co. v. Lawrence*, 2 Hun, 163 (1873); affirmed in 56 N. Y. 612 (1874), was followed *Willson v. Black Bird Creek Marsh Co.* as applicable to a wharf that but partially obstructed navigation. See also *Griffing v. Gibb*, 1 McAll. 212, 11 Fed. Cas. No. 5,819 (1857); reversed in 2 Black, 519, 17 L. ed. 353 (Dec. T. 1862). In *State v. City of Eau Claire*, 40 Wis. 533 (1876), was sustained the construction of a dam for the purpose of construction of water works. So in *Ormerod v. N. Y., West Shore & Buffalo R. R. Co.*, 13 Fed. 370 (C. C. N. Y., 1882), of construction of railroad in navigable waters.

See also, as to construction of dams under authority of State, *Woodman v. Kilbourn Manuf. Co.*, 1 Biss. 546, 30 Fed. Cas. No. 17,978 (1867); *Spooner v. McConnell*, 1 McLean, 337, 22 Fed. Cas. No. 13,245 (1838); *Glover v. Powell*, 10 N. J. Eq. 211 (1854); *Hogg v. Zanesville Canal, etc., Co.*, 5 Ohio, 410 (1832); *Brown v. Commonwealth*, 3 Serg. & R. (Pa.) 273 (1817); *Bacon v. Arthur*, 4 Watts (Pa.), 437 (1835); *Stoughton v. State*, 5 Wis. 291 (1856).

As to sufficiency of authority under State statute for obstruction of navigation, see *U. S. v. Bellingham Bay Boom Co.*, 176 U. S. 211, 20 Supm. 343, 44 L. ed. 437 (1900), reversing 81 Fed. 658, 26 C. C. A. 547 (9th C. 1897); 72 Fed. 585 (C. C. Wash., 1896); *U. S. v. Wishkah Boom Co.*, 136 Fed. 42, 68 C. C. A. 592 (9th C. 1905).

As to liability for injury to riparian owner, see *Doucette v. Little Falls Improvement Co.*, 71 Minn. 206, 73 N. W. 847 (1898).

As to distinction between authority of State and of mere individual, to erect structure in navigable waters, see *Atlee v. Packet Co.*, 21 Wall. 389, 22 L. ed. 619 (Oct. 1874); also note 25, *infra*.

That so far as the commerce clause is concerned, under State

certain conditions prescribed by Congressional legislation.²⁵

§ 86. Control of persons and property.

It has already been seen that the powers reserved to the States that may be exercised, though commerce within the scope of the commerce clause be thereby affected, include the power *to control persons and property*, that is, within the territorial limits of the State. It is such power, as thus affecting such commerce, that is now to be considered in detail.

§ 87. Production, sale, and use of property.

In view of the Fourteenth Amendment, it requires no argument that the power reserved to the States to prohibit or otherwise regulate the production, sale, or use, of property within its territory is not without

authority may be granted the use of navigable waters even for a private purpose, if not interfering with their use for commerce, see *Hoelt v. Seaman*, 46 How. Pr. 24 (N. Y. Super. Ct. 1873). Compare *Texas & P. Ry. Co. v. City of New Orleans*, 40 Fed. 111 (C. C. La., 1889); *Rutz v. City of St. Louis*, 10 Fed. 338 (C. C. Mo., 1882).

²⁵ See § 48. As with bridges, it seems clear, however, that no objection to exercise by a State of the power in question is furnished by a provision in the ordinance for government of the Northwest Territory, or like provisions in statutes for admission of States. See *Manigault v. Springs*, *supra*, and decisions cited under § 83.

In *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 Fed. 753, 786, 811 (C. C. Cal., 1884), however, in view of such a provision, was denied the power of the State to authorize "obstructing, much less destroying, the navigation of her rivers and bays for purposes having no relation to facilitating navigation or commerce," thus, as here, the sending down and deposit of mining debris.

As to effect of act of February 18, 1793, granting licenses for coasting trade, see *Delaware & Hudson Canal Co. v. Lawrence*, 2 Hun, 163 (1873); affirmed in 56 N. Y. 612 (1874).

limit, but it is equally clear that, whether or not broader in its scope than what is commonly characterized as the "police power," such power not only exists, but is extensive.²⁶ It may be manifested as the power to prohibit or otherwise regulate the production, sale, or use of an article possessing deleterious qualities; or to prevent fraud or deception in sales, or the sale of adulterated articles; or to control property the subject of common ownership, such as game; or to prohibit the manufacture and sale of intoxicating liquors. We are not here, however, primarily concerned to determine the source and precise extent of such reserved power, so variously manifested. Such determination would be based on various considerations, notably the effect of the Fourteenth Amendment. But what we are primarily concerned to determine is the incidental effect of such power (whenever such power is found to exist) upon transportation within the scope of the commerce clause. It will be seen in detail that in some cases, such as the power to prohibit or otherwise regulate the production, sale, or use of articles possessing deleterious qualities, such as disease, the power to regulate transportation within the scope of the commerce clause is established, while, with what seems to us to be a strange inconsistency, the contrary seems established as to other cases, notably that of intoxicating liquors.²⁷

²⁶ In *Austin v. Tennessee*, 179 U. S. 343, 347, 21 Supm. 132, 133, 45 L. ed. 224 (1900), it was said with reference to prohibition by a State of production and sale: "How far such laws could be made applicable to articles admitted to be innocuous has never been decided by this court." In sustaining a statute prohibiting the sale of cigarettes, it was here regarded unnecessary to decide the point.

²⁷ Thus, in *Stubbs v. People*, 90 Pac. 1114 (Colo. Supm. Ct. 1907), applying the rule established as to intoxicating liquors (see § 98), was held invalid the prohibition of the transportation

§ 88. Transportation of "article of commerce."

In view of what has just been said, it seems to follow that, in determining in any given instance, whether it is within the power of a State to regulate the transportation of property within the scope of the commerce clause, the preliminary inquiry should be: *What, if any, is the power of the State to prohibit or otherwise regulate the production, sale, or use of such property within its Territory?* If such power be found to exist, it then follows, in the view herein taken, that, so far at least as necessary to a complete exercise of such power, it is also within the power of the State to regulate, even to the extent of prohibition, *transportation thereof within the scope of the commerce clause*, that is, transportation into, or it may be out of, the State. But this is not, in terms at least, the accepted test of the power of the State to so prohibit or otherwise regulate such transportation, it being rather whether the subject of transportation is "*a lawful article of commerce.*"²⁸ If, however, we define "*a lawful article of commerce*" as *an article that it is beyond the power of the State by way of exercise of the police power or otherwise to prohibit or otherwise regulate the production, sale, or use of*, the accepted test seems substantially identical with that here suggested. The accepted test has been principally used with reference to intoxicating liquors,²⁹ and this

of docked-tailed horses into the State, though in *Bland v. People*, 32 Colo. 319, 76 Pac. 359, 65 L. R. A. 424, 105 Am. St. Rep. 80 (1904), it had been held within the "police power" of the State to prohibit their use.

²⁸ It being said in *Schollenberger v. Pennsylvania*, 171 U. S. 1, 12, 18 Supm. 757, 761, 43 L. ed. 49 (1898), to be beyond the power of the State to "wholly exclude" such. See as to such power article in 4 Mich. Law Rev. 124 (1905), by T. A. Sims.

²⁹ It being established that such are "articles of commerce" within the rule stated. *Bowman v. Chicago & Northwestern Ry.*

use of language seems to have served to more readily obscure the fallacy elsewhere considered, that while it is within the power of the State to absolutely prohibit the *production and sale* of such "articles of commerce," it may not as an incident of such power prohibit the transportation thereof into its territory. There is no doubt that the definition of "lawful article of commerce" excludes for instance articles "which on account of their existing condition would bring in and spread disease, pestilence, and death."³⁰ On the other hand it is said that "whatever product has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of Federal regulation and taxation, must, we think, be recognized as a legitimate article of commerce, although it may to a certain extent be within the police power of the States."³¹

Co., infra; Leisy v. Hardin, 135 U. S. 100, 125, 10 Supm. 681, 690, 34 L. ed. 128 (1890); *Re Rahrer*, 140 U. S. 545, 11 Supm. 865, 35 L. ed. 572 (1891). This is so, at any rate, so long as they are recognized by Congress "as subjects of interstate commerce." *Leisy v. Hardin*, *supra*.

³⁰ *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 489, 8 Supm. 689, 700, 31 L. ed. 700 (1888). Here were instanced "rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption." This, however, is but the incidental effect of exercise of the powers presently to be considered.

³¹ *Austin v. Tennessee, infra*. In *Schollenberger v. Pennsylvania*, in holding oleomargarine to be an article of commerce, the question was held (171 U. S. 8, 18 Supm. 759) to be one to be determined "with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which

§ 89. Transportation of persons.

The power of the States to regulate, even to the extent of prohibition, transportation of persons within the scope of the commerce clause, rests on substantially the same ground as does their power to regulate such transportation of property. The States do not, indeed, have, in a strict sense, the power to regulate the production, sale, or use of persons, at any rate, under conditions of freedom. But their power of control over such persons, whether by way of exercise of the police power or otherwise, seems tantamount to the power to regulate the production, sale, or use of

are of like notoriety." It appeared that Congress by its legislation had "recognized the article as a proper subject of taxation and as one which was the subject of traffic and of exportation to foreign countries and of importation from such countries;" that thereby "its manufacture was recognized as a lawful pursuit, and taxation was levied upon the manufacturer of the article, upon the wholesale and retail dealers therein, and also upon the article itself." It also appeared that it was well known as an article of food, and manufactured as a substitute for butter; that it was a subject of export, and largely used in foreign countries. So in *Leisy v. Hardin*, *infra*, some importance seems to have been attached to the circumstance that the liquors in question had been recognized by Congress "as subjects of interstate commerce." So as to tobacco, in *Austin v. Tennessee*, *infra*.

That tobacco (including cigarettes) is an article of commerce, see *Austin v. Tennessee*, 179 U. S. 343, 345, 21 Supm. 132, 45 L. ed. 224 (1900); *State v. Lowry*, 166 Ind. 372, 77 N. E. 728, 4 L. R. A. N. S. 528 (1906). Compare *Re Minor*, 69 Fed. 233 (C. C. W. Va., 1895); *Sawrie v. State of Tennessee*, 82 Fed. 615 (C. C. Tenn., 1897); *Blaufield v. State*, 103 Tenn. 593, 53 S. W. 1090 (1899). So of natural gas, *State v. Indiana & Ohio Oil, etc., Co.*, 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579 (1889). In *Re Ware*, 53 Fed. 783 (C. C. Minn., 1892), baking powder was held an article of commerce so as not to be subject to a requirement of labeling in a particular manner. As to commercial fertilizers, see *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. 609, 11 L. R. A. 179 (C. C. N. C., 1890.) As to a lottery ticket, see *Roselle v. Farmers' Bank of Norborne*, 141 Mo. 36, 39 S. W. 274, 64 Am. St. Rep. 501 (1897).

property. For instance they may imprison criminals and isolate those physically or mentally diseased. And here, too, so far at least as necessary to a complete exercise of such power, it is doubtless within the power of the States to regulate, even to the extent of prohibition, transportation of persons within the scope of the commerce clause.³² This has been conspicuously illustrated in case of quarantine regulations. It would seem, however, that such power "can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity."³³

³² In *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 23 L. ed. 543 (Oct. 1875), it was regarded as unnecessary to determine whether, in the absence of action by Congress (as to the effect of which, see § 34), "the States can, or how far they can, by appropriate legislation, protect themselves against *actual* paupers, vagrants, criminals, and diseased persons arriving in their territory from foreign countries." The restriction here held invalid (see § 71) was applicable to all passengers alike. See also *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550 (Oct. 1875).

Of doubtful authority would now seem *City of New York v. Miln*, 11 Pet. 102, 9 L. ed. 648 (Jan. T. 1837), where was sustained a provision in a New York statute requiring the master of a vessel arriving in the port of New York from any country out of the United States, or from any other State, to within twenty-four hours after arrival report the name, place of birth, legal settlement, age, and occupation of every person brought as a passenger from any such country or State. See discussion of this decision in connection with the *Passenger Cases*, 7 How. 283, 12 L. ed. 702 (Jan. T. 1849), in *Henderson v. Mayor of N. Y.*, *supra*.

As to statute regulating disinterment, see *Re Wong Yung Quy*, 2 Fed. 624 (C. C. Cal., 1880).

In *State v. Kansas & T. Coal Co.*, 96 Fed. 353 (C. C. Ark., 1899); reversed on other grounds in *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 22 Supm. 47, 46 L. ed. 144 (1901), an injunction was held improperly allowed in a State court against importing into the State "a large number of armed men of the low and lawless type of humanity," such action of the court being, however, based on no statute of the State.

³³ *Chy Lung v. Freeman*, *supra*.

§ 90. Power as depending on deleterious quality; e. g., disease in cattle.

It is doubtless within the power of a State to wholly prohibit the production, sale, or use within its limits of an article possessing qualities that make it necessarily and under all conditions deleterious. Commonly, however, a given article is not deleterious to that extent, and it is ordinarily within the power of the State to prohibit its production, sale, or use, not, indeed, altogether, but only in case of it possessing some deleterious quality. As an illustration applicable, generally, to articles that are subjects of transportation, may be taken the case of cattle or other animals suitable for food. It is not ordinarily within the power of the State to prevent, for instance, the sale of such cattle, but it is to prevent the sale of such cattle so diseased as to prevent them from being suitable for food. According to the view herein taken, it follows that it is not ordinarily within the power of the State to prohibit or otherwise regulate the transportation of such cattle within the scope of the commerce clause, thus by way of prohibiting their transportation into the State³⁴ without discriminating between "the good and the bad, the healthy and the diseased, and to an extent beyond what is necessary for any proper quarantine."³⁵ Indeed, such power of

³⁴ Not clear seems the power to regulate, on this ground, transportation *out of* the State, though in *People v. Bishopp*, 106 App. Div. 266, 94 N. Y. Suppl. 773 (1905), affirming 44 Misc. 12, 89 N. Y. Suppl. 709 (1904), was sustained as applicable to such transportation a requirement that a tag be attached to a carcass of a calf in a manner prescribed.

³⁵ *Smith v. St. Louis & Southwestern Ry. Co.*, 181 U. S. 248, 21 Supm. 603, 45 L. ed. 847 (1901). Thus, in *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527 (Oct. 1877), reversing *Husen v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 226 (1875), was held invalid a statute providing that "no Texas, Mexican, or Indian cattle

regulation by the State is said not to exist "beyond what is absolutely necessary for its self-protection."³⁶ But it is established that it is within its power to prohibit or otherwise regulate such transportation of cattle so diseased as to prevent them from being suitable for food.³⁷

shall be driven or otherwise conveyed into, or remain in any county in this State between March 1 and November 1 in each year," there being no distinction between such as might be diseased and such as were not, and no provision for inspection. So held, notwithstanding proviso that such cattle might come across the State line loaded upon a railroad car or steamboat and pass through the State without being unloaded, such right being, however, accompanied with onerous liabilities. See comments on this decision in *Rasmussen v. Idaho*, *infra*. *Railroad Co. v. Husen* was followed under the same statute in *Gilmore v. Hannibal & St. Joseph R. R. Co.*, 67 Mo. 323 (1878); *Urton v. Sherlock*, 75 Mo. 247 (1881). See *Bradford v. Floyd*, 80 Mo. 207 (1883). See to the contrary the earlier decisions in *Wilson v. Kansas City, St. Joseph, etc., R. R. Co.*, 60 Mo. 184 (1875); *Mercer v. Kansas City, St. Joseph, etc., R. R. Co.*, 60 Mo. 397 (1875); *Kenney v. Hanni. & St. Jo. R. R. Co.*, 62 Mo. 476 (1876).

Railroad Co. v. Husen was followed as applicable to an Illinois statute in *Salzenstein v. Mavis*, 91 Ill. 391 (1879); *Chicago & Alton R. R. Co. v. Erickson*, 91 Ill. 613, 33 Am. Rep. 70 (1879); *Jarvis v. Riggin*, 94 Ill. 164 (1879). Here were overruled *Yeazel v. Alexander*, 58 Ill. 254 (1871); *Stevens v. Brown*, 58 Ill. 289 (1871); *Somerville v. Marks*, 58 Ill. 371 (1871); *Chicago & Alton R. R. Co. v. Gasaway*, 71 Ill. 570 (1874).

³⁶ *Railroad Co. v. Husen*, *supra*. See also *Reid v. Colorado*, *infra*; *Smith v. St. Louis & Southwestern Ry. Co.* (§ 95). Thus it is not ordinarily necessary to prohibit or otherwise regulate the transportation of even diseased cattle merely through the State, though doubtless such transportation might be under conditions justifying regulation by the State. See *Grimes v. Eddy*, 126 Mo. 168, 28 S. W. 756, 26 L. R. A. 638, 47 Am. St. Rep. 653 (1894), holding invalid prohibition thereof. To the same effect, *Selvege v. St. Louis & San Francisco Ry. Co.*, 135 Mo. 163, 36 S. W. 652 (1896).

³⁷ Thus, in *Reid v. Colorado*, 187 U. S. 137, 23 Supm. 92, 47 L. ed. 108 (1902), affirming 29 Colo. 333, 68 Pac. 228, 93 Am. St.

§ 91. Prevention of fraud or deception.

It seems clearly within the power of the State to prohibit fraud or deception in sales, thus, of articles

Rep. 69 (1902), was sustained a statute declaring a criminal liability for, under certain conditions, bringing into the State cattle or horses having an infectious or contagious disease. Here there was held not to have been any Congressional legislation covering the subject, the Animal Industry Act of May 29, 1884 (23 Stat. L. 31) being inapplicable. As to this and other legislation by Congress, see § 33. To the same effect, *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 18 Supm. 488, 42 L. ed. 878 (1898), affirming 56 Kan. 694, 44 Pac. 632 (1896), as to a statute declaring any person driving or transporting into the State any cattle liable or capable of communicating Texas, splenic, or Spanish fever, to any domestic cattle of the State, liable for damages by reason of communication of such disease. See (169 U. S. 635, 18 Supm. 497) as to effect of receiving cattle for transportation in good faith and without reason to believe them liable to impart or capable of communicating the disease in question. See as to same statute *Patee v. Adams*, 37 Kan. 133, 14 Pac. 505 (1887); *Missouri Pacific Ry. Co. v. Finley*, 38 Kan. 550, 16 Pac. 951 (1888); *Rouse v. Youard*, 1 Kan. App. 270, 41 Pac. 426 (1895). So in *Rasmussen v. Idaho*, 181 U. S. 198, 21 Supm. 594, 45 L. ed. 820 (1901), affirming *State v. Rasmussen*, 7 Idaho, 1, 59 Pac. 933, 52 L. R. A. 78, 97 Am. St. Rep. 234 (1900), was sustained a statute providing that "whenever the Governor has reason to believe that scab or any other infectious disease of sheep has become epidemic in certain localities in any other State or Territory, or that conditions exist that render sheep likely to convey disease, he must thereupon by proclamation designate such localities and prohibit the importation from them of any sheep into the State, except under such restrictions as, after consultation with the State sheep inspector, he may deem proper." See also as to such statute *Smith v. Lowe*, 121 Fed. 753, 59 C. C. A. 185 (9th C. 1903). Similar provisions were sustained in *Adams v. Lytle*, 154 Fed. 876 (C. C. Oreg., 1907). See also *State v. Railroad*, 141 N. C. 846, 54 S. E. 294 (1906). As to provision as to diseased cattle running at large, see *Kim-mish v. Ball*, 129 U. S. 217, 9 Supm. 277, 32 L. ed. 695 (1889).

As to quarantine regulations, see § 95.

prepared in imitation of others, so as to induce a person to buy an article so prepared, in the belief that he is buying the article imitated, thus, oleomargarine for butter.³⁸ It seems to follow that it is equally within its power to incidentally regulate, even to the extent of prohibition, the transportation of such articles, though within the scope of the commerce clause, thus, into the State.³⁹ This power is closely analogous to the power to regulate the transportation of adulterated articles, and, indeed, is perhaps properly to be regarded as including it. But it is certainly broader in its scope. It should be observed that the power to prohibit fraud or deception in the sale of one article for another should not be regarded as depending on the intrinsic qualities of the article sold for the other. Brass may not be inherently objectionable; it may even be properly regarded as "an article of commerce" in the full sense of the term, but it does not follow that there is nothing objectionable in inducing a person to buy an article made of brass in the belief that he is buying one made of gold. Nor because cotton garments are inherently unobjectionable and "articles of commerce," does it follow that there is nothing objection-

³⁸ See *Powell v. Pennsylvania*, 127 U. S. 678, 8 Supm. 992, 1257, 32 L. ed. 253 (1888).

³⁹ Thus as to fraud by itinerant vendors of wearing apparel, *Re Mosler*, 4 Ohio Cir. Dec. 82 (1894); or of medicine, *Commonwealth v. Newhall*, 164 Mass. 338, 41 N. E. 647 (1895). See also *Commonwealth v. Crowell*, 156 Mass. 215, 30 N. E. 1015 (1892). As to clocks, see *Commonwealth v. Harmel*, 166 Pa. St. 89, 30 Atl. 1036, 27 L. R. A. 388 (1895).

In *Jewett v. Smail*, 105 N. W. 738 (Supm. Ct. S. D., 1905), however, was held invalid, as applied to articles transported into the State, a prohibition of sale of prepared foods without the true name of the manufacturer and the location of the factory where prepared being printed or stenciled on the package or other container.

able in inducing a person to buy a cotton garment in the belief that he is buying one made of wool.⁴⁰ We

⁴⁰ All this should seem sufficiently obvious, in view of the eminently sound decision in *Plumley v. Massachusetts* (see § 91a), the authority of which was greatly shaken, if indeed, it was not overruled by *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Supm. 757, 43 L. ed. 49 (1898), reversing *Commonwealth v. Paul*, 170 Pa. St. 284, 33 Atl. 82, 30 L. R. A. 396, 50 Am. St. Rep. 776 (1895). This seem to us clearly unsound as based on the error indicated in the text, that is, regarding the power to prohibit fraud or deception as depending on *the intrinsic qualities of the article sold for the other*, thus, as in this case, whether the article so sold was an "article of commerce." Here was held invalid, as applied to sales of oleomargarine transported into the State, a statute prohibiting the manufacture out of any oleaginous substance, etc., of "any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese;" also the sale thereof. This on the ground that such oleomargarine had become "a proper subject of commerce among the States and with foreign nations," it having been openly manufactured for nearly a quarter of a century, the ingredients of which, when pure, and the general process of manufacture of which had long been known. See as to effect of legislation by Congress. It was held to make no difference (171 U. S. 12, 18 Supm. 761) that the inspection or analysis of the article is "somewhat difficult and burdensome." The conclusion of the dissenting judges that this decision is not only unsound, but inconsistent with *Powell v. Pennsylvania*, where the same legislation had been sustained as applied to sale of oleomargarine manufactured within the State, seems to us to be unanswerable.

Schollenberger v. Pennsylvania was followed under like conditions in *Collins v. New Hampshire*, 171 U. S. 30, 18 Supm. 768, 43 L. ed. 60 (1898), reversing *State v. Collins*, 67 N. H. 540, 42 Atl. 51 (1893), as applicable to prohibition of sale of oleomargarine unless of a pink color. See *State v. Marshall*, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51 (1888). *Collins v. New Hampshire* was followed under like conditions in *State v. Bruce*, 55 W. Va. 384, 47 S. E. 146 (1904), overruling *State v. Myers*, 42 W. Va. 822, 26 S. E. 539, 35 L. R. A. 844, 57 Am. St. Rep. 887 (1896).

For other instances of such legislation held invalid as applied to

express no opinion here as to the advisability of such legislation by the State in prohibition of fraud or deception. We venture, indeed, to suggest that the scope thereof has been unduly extended. But this is not the point to be considered, which is that, so long as such power of the State is recognized as applied to production and sale wholly within its own limits, it should be held to equally apply to transportation, though within the scope of the commerce clause.

oleomargarine transported into the State, see *Ex parte Scott*, 66 Fed. 45 (C. C. Va., 1895); *Re Brundage*, 96 Fed. 963 (C. C. Minn., 1899); reversed on another point in *Minnesota v. Brundage*, 180 U. S. 499, 21 Supm. 455, 45 L. ed. 639 (1901); *Waterbury v. Egan*, 3 Misc. 355, 23 N. Y. Suppl. 115 (N. Y. City Ct., Gen. T. 1893). Thus, in *Fox v. State*, 89 Md. 381, 43 Atl. 775, 73 Am. St. Rep. 192 (1899), of a prohibition of the sale of any article "in imitation or semblance of natural butter;" so in *McAllister v. State*, 94 Md. 290, 50 Atl. 1046 (1902), of a prohibition of the sale of any article "in imitation or semblance of yellow butter," in the absence of evidence that the coloring matter was impure or injurious to health.

On this point the following decisions must be regarded as overruled, or, at any rate, of doubtful authority: *Armour Packing Co. v. Snyder*, 84 Fed. 136 (C. C. Minn., 1897); *State v. Addington*, 77 Mo. 110 (1882), affirming 12 Mo. App. 214 (1882); *Waterbury v. Newton*, 50 N. J. Law, 534, 14 Atl. 604 (1888).

By the act of May 9, 1902 (32 Stat. L. 194), as in case of intoxicating liquors (see § 99), oleomargarine and like products are, "upon the arrival within the limits of" a State, etc., "subject to the operation and effect of the laws" thereof "enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such State," etc. In *U. S. v. Green*, 137 Fed. 179 (D. C. N. Y., 1905), such provision was held not to exempt from liability for removal from such articles of marks, stamps, and labels elsewhere provided for by Congress. Compare *U. S. v. Joyce*, 138 Fed. 457 (D. C. Pa., 1905).

As to taxation of oleomargarine by Congress, see act of August 2, 1886 (24 Stat. L. 209); act of May 9, 1902 (32 Stat. L. 194); *McCray v. U. S.*, 195 U. S. 27, 24 Supm. 769, 49 L. ed. 78 (1904).

§ 91a. *Plumley v. Massachusetts*.⁴¹

There was sustained as applicable to sales of oleomargarine transported into the State a statute prohibiting under a penalty the manufacture or sale of "any article, product, or compound made wholly or partly out of any fat, oil, or oleaginous substance or compound thereof, not produced from unadulterated milk

⁴¹ 155 U. S. 461, 15 Supm. 154, 39 L. ed. 223 (1894), affirming *Commonwealth v. Huntley*, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839 (1892). Referring to certain legislation by Congress, the vital question in the case was (155 U. S. 467, 15 Supm. 156) declared unaffected thereby, or by any regulations established in execution of its provisions. See *People v. Meyer*, 89 App. Div. 185, 85 N. Y. Suppl. 834 (1903). Here was distinguished (155 U. S. 473, 15 Supm. 158) *Leisy v. Hardin*, 135 U. S. 100, 10 Supm. 681, 34 L. ed. 128 (1890), as not a case of deception.

Plumley v. Massachusetts was applied under like conditions in *Re Scheitlin*, 99 Fed. 272 (C. C. Mo., 1900); *State v. Rogers*, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395 (1901); *Commonwealth v. Vandyke*, 13 Pa. Super. 484 (1900); *Commonwealth v. McCann*, 14 Pa. Super. 221 (1900). So in *Hathaway v. McDonald*, 27 Wash. 659, 68 Pac. 376, 91 Am. St. Rep. 889 (1902), as applicable to a statute requiring process "butter" to be marked with the words "renovated butter." So in *Arbuckle v. Blackburn*, 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864 (6th C. 1902); appeal dismissed in 191 U. S. 405, 24 Supm. 148, 48 L. ed. 239 (1903), to statute prohibiting sale of food "colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if, by any means it is made to appear better or of greater value than it really is."

See also as to legislation of this character *People v. Niagara Fruit Co.*, 75 App. Div. 11, 77 N. Y. Suppl. 805 (1902); affirmed on opinion below in 173 N. Y. 629, 66 N. E. 1114 (1903).

Plumley v. Massachusetts overrules, in so far as contrary thereto, *Re Worthen*, 58 Fed. 467 (C. C. Ohio, 1891). It was in *Crossman v. Lurman*, 192 U. S. 189, 24 Supm. 234, 48 L. ed. 401 (1904), affirming 171 N. Y. 329, 63 N. E. 1097, 98 Am. St. Rep. 599 (1902); 57 App. Div. 393, 68 N. Y. Suppl. 311 (1901), followed as applicable to artificially colored coffee. See as to effect of act of Congress of August 30, 1890 (26 Stat. L. 414).

or cream from the same, *which shall be in imitation of yellow butter* produced from pure unadulterated milk or cream of the same," it being, however, provided that "nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as will advise the customer of its real character, free from discoloration or ingredient that causes it to look like butter."

§ 92. Prevention of sale of adulterated articles.

It seems clearly within the power of the State to prohibit the sale of adulterated articles.⁴² It seems equally within its power to incidentally regulate, even to the extent of prohibition, the transportation of such articles, though within the scope of the commerce clause, thus, into the State. As already stated, this power is closely analogous to the power already considered to prohibit the transportation of articles prepared in imitation of others, and is perhaps properly to be regarded as included in it. But such power is said not to extend to the absolute prohibition of transportation of an article, merely on the ground of it *being liable* in the course of preparation to adulteration; that this is so, at any rate, as to a "lawful article of commerce" that in its pure state is healthful, and has ceased to be "a newly discovered product,"⁴³ conceding it to be otherwise of a newly discovered product, the properties of which are not yet sufficiently known.⁴⁴

⁴² See, for instance, *Arbuckle v. Blackburn* (§ 91a).

Thus, in *Fox v. State*, 89 Md. 381, 43 Atl. 775, 73 Am. St. Rep. 192 (1899), was sustained a prohibition of the sale of impure and deleterious oleomargarine.

⁴³ *Schollenberger v. Pennsylvania*, *infra*.

⁴⁴ *Schollenberger v. Pennsylvania*, 171 U. S. 1, 14, 18 Supm. 757, 762, 41 L. ed. 49 (1898), as to which, however, see § 91.

§ 93. Inspection.

It frequently becomes desirable to employ some method of determining whether, in case of a given subject of transportation, there exist conditions that bring it within the power of the State to prohibit or otherwise regulate its transportation within the scope of the commerce clause, thus, to determine whether an article possesses deleterious qualities, or is prepared in imitation of another article, or is adulterated.⁴⁵ Such a method is that of inspection of the article in question, inspection being defined as "the examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce."⁴⁶ There is said to be no doubt as to the validity of provisions for inspection as a condition of allowing transportation into the State if "manifestly intended and calculated in good faith to protect the public health, the public morals, or the public safety."⁴⁷ But provisions for inspection may be in-

⁴⁵ See *Schollenberger v. Pennsylvania*, 171 U. S. 1, 24, 18 Supm. 757, 766, 43 L. ed. 49 (1898).

⁴⁶ Bouvier's Law Dictionary, quoted in *Patapsco Guano Co. v. North Carolina Board of Agriculture*, *infra*. In *Foster v. Master & Wardens*, 94 U. S. 246, 24 L. ed. 122 (Oct. 1876), reversing *Master & Wardens of Port of New Orleans v. Foster*, 26 La. Ann. 105 (1874), was held not valid as an "inspection law," a statute prohibiting others than the master and wardens of the port of New Orleans from making any survey of the hatches of sea-going vessels coming to that port or to make any survey of damaged goods coming on board such vessels, the purpose of such provision being said to be "to furnish official evidence for the parties immediately concerned and, where the goods are damaged, to provide for and regulate their sale."

⁴⁷ *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, 357, 18 Supm. 862, 867, 43 L. ed. 191 (1898), affirming 52 Fed. 690 (C. C. N. C., 1892). Here was sustained the imposition of a charge of twenty-five cents per ton a year on commercial fertilizers, for the purpose of defraying the expenses con-

valid as imposing an unnecessarily onerous burden upon transportation within the scope of the commerce

nected with inspection thereof. The same statute had been sustained in *State v. Caraleigh Phosphate, etc., Works*, 119 N. C. 120, 25 S. E. 795 (1896). See under former statute *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. 609, 11 L. R. A. 179 (C. C. N. C., 1890). See also *State v. Norris*, 78 N. C. 443 (1878). See also as to provision for inspection of commercial fertilizers *State v. Lagarde*, 60 Fed. 186 (C. C. La., 1894). Compare as to requirement of tagging *Merriman v. Knox*, 99 Ala. 93, 11 So. 741 (Nov. T. 1892); *Brown v. Adair*, 104 Ala. 652, 16 So. 439 (Nov. T. 1894). A provision for inspection of cattle was sustained in *State v. Asbell*, 74 Kan. 397, 86 Pac. 457 (1906).

In *New Mexico ex rel. McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 27 Supm. 1, 51 L. ed. 78 (1906), affirming *Territory ex rel. v. Denver & Rio Grande R. R. Co.*, 12 N. M. 425, 78 Pac. 74, 79 Pac. 295 (1904), the provision for amount of fee for inspection was sustained as not "so unreasonable and disproportionate to the services rendered as to attack the good faith of the law."

In *Globe Elevator Co. v. Andrew*, 144 Fed. 871 (C. C. Wis., 1906), provisions for the inspection of grain were held invalid on the ground that the dominant purpose was to "destroy" the system of inspection provided for in another State, and substitute another system of inspection. The soundness of such conclusion seems very doubtful, so far at least as the commerce clause is concerned.

See also as to State inspection laws *Neilson v. Garza*, 2 Woods, 287, 17 Fed. Cas. No. 10,091 (1876); *Addison v. Saulnier*, 19 Cal. 82 (1861); *City Council of Charleston v. Rogers*, 2 McCord (S. C.), 495, 13 Am. Dec. 751 (1823); *Board of Hay Inspectors v. Pleasants*, 23 La. Ann. 349 (1871); *State v. Fosdick*, 21 La. Ann. 256 (1869); *Green v. Mayor, etc., of Savannah*, R. M. Charl. (Ga.) 368 (1832); *Vanmeter v. Spurrier*, 94 Ky. 22, 21 S. W. 337 (1893); *Burkhardt v. Striger*, 113 Ky. 111, 67 S. W. 270 (1902); *Clark v. Board of Health*, 30 La. Ann. 1351 (1878).

In *Pittsburg & Southern Coal Co. v. Louisiana*, 156 U. S. 590, 15 Supm. 459, 39 L. ed. 544 (1895), affirming *State v. Pittsburg & Southern Coal Co.*, 41 La. Ann. 465, 6 So. 220 (1889), was sustained a provision for the gauging of coal and coke boats, as applied to boats engaged in transportation within the scope of the commerce clause. But in *Collins v. City of Louisville*, 2 B.

clause, thus, by way of creation of "discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States."⁴⁸ And, notwithstanding that

Monr. (Ky.) 134 (1841), such a requirement of measurement of coal was held invalid because of charge being unnecessarily great.

In *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 488, 8 Supm. 689, 700, 31 L. ed. 700 (1888), a statute prohibiting the transportation of intoxicating liquors into the State was held not sustainable as an inspection law, but as seen elsewhere such prohibition might have been sustained on another ground.

That a State inspection law cannot properly be applied to articles in transit through the State between points both outside, see *Corporation of Georgetown v. Davidson*, 6 D. C. 278 (1868). Compare *Hancock v. Sturges*, 13 Johns. (N. Y.) 331 (1816). But see *Commonwealth v. King*, 1 Whart. (Pa.) 448 (1836).

⁴⁸ *Brimmer v. Rebman*, 138 U. S. 78, 11 Supm. 213, 34 L. ed. 862 (1891), affirming *Re Rebman*, 41 Fed. 867 (C. C. Va., 1890). Here was held invalid a statute prohibiting offering for sale any fresh meats slaughtered 100 miles or over from the place at which offered for sale, until inspected and approved in a manner provided, there being a heavy charge for such inspection, this being regarded by the court as producing discrimination in favor of local dealers. So in *Voight v. Wright*, 141 U. S. 62, 11 Supm. 855, 35 L. ed. 638 (1891), of a statute providing that all flour brought into the State and offered for sale therein should be reviewed and have the State inspection marked thereon. So in *Minnesota v. Barber*, 136 U. S. 313, 10 Supm. 862, 34 L. ed. 455 (1890), affirming *Re Barber*, 39 Fed. 641 (C. C. Minn., 1889), of a statute prohibiting the sale of fresh beef, etc., for food, unless taken from an animal inspected within twenty-four hours before slaughter and certified by a local inspector, it being held no answer that the statute was "applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other States." See under same statute *Swift v. Sutphin*, 39 Fed. 630 (C. C. Ill., 1889); *Re Christian*, 39 Fed. 636 (Minn., 1889). The same result was reached in *Schmidt v. People*, 18 Colo. 78, 31 Pac. 498 (1892), where the prescribed period for inspection was forty-eight hours. *Minnesota v. Barber* was followed under like conditions in *State v. Klein*, 126 Ind. 68, 25 N. E. 873 (1890); *Hoffman v. Harvey*, 128 Ind. 600, 28 N. E. 93 (1891), affirming *Harvey v. Huff-*

the object of a given provision is avowedly for inspection, it is open to inquiry not only whether "there is a real or substantial relation between its avowed objects and the means devised for attaining those objects," but also "whether by its necessary or natural operation" it is invalid as in contravention of the commerce clause.⁴⁹ It is said that "inspection laws" have no proper application to persons, at any rate to "free human beings," being confined in their application to property.⁵⁰ This scarcely appears, however, to be a substantial distinction, for it is certainly within the power of the State to make quarantine regulations, for instance, applicable to the transportation of persons within the scope of the commerce clause.

§ 94. The same; in case of transportation out of State.

A provision for inspection is capable of application as a condition of transportation, not only *into* but *out* of the State. The purpose in the latter class of cases

man, 39 Fed. 646 (Ind., 1889). See also *Ex parte Kieffer*, 40 Fed. 399 (C. C. Kan., 1889); *Georgia Packing Co. v. Mayor, etc., of Macon*, 60 Fed. 774, 22 L. R. A. 775 (C. C. Ga., 1893).

Within the same general rule seems *Re Sanders*, 52 Fed. 802, 18 L. R. A. 549 (C. C. N. C., 1892), holding invalid a requirement as to marking packages, etc., containing seed, there being excepted "farmers selling seed in open bulk to other farmers or gardeners." So in *State v. Duckworth*, 5 Idaho, 642, 51 Pac. 456, 39 L. R. A. 365, 95 Am. St. Rep. 199 (1897), of a requirement of the inspection and dipping of sheep.

See also *Glover v. Board of Flour Inspectors*, 48 Fed. 348 (C. C. La., 1891); *Higgins v. 300 Casks of Lime*, 130 Mass. 1 (1880).

⁴⁹ *Minnesota v. Barber*, *supra*. See also *Brimmer v. Rebman*, *supra*; *Austin v. Tennessee*, 179 U. S. 343, 344, 21 Supm. 132, 45 L. ed. 224 (1900).

⁵⁰ *People v. Compagnie Générale Transatlantique*, 107 U. S. 59, 2 Supm. 87, 27 L. ed. 383 (1883), citing *Gibbons v. Ogden*, 9 Wheat. 1, 119, 6 L. ed. 23 (1824). See *People v. Edye*, 11 Daly (N. Y.), 132 (1882).

seems somewhat different from that in the former, being "to improve the quality of articles produced by the labor of a country and fit them for exportation."⁵¹ And it is said not to be strictly necessary in this class of cases, that provision be made for an examination of the quality of the article itself.⁵² In this view of such provisions, it seems not clear that they would not be invalid as in contravention of the commerce clause,⁵³ but for the recognition of their validity in the constitutional provision that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be

⁵¹ *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, 354, 18 Supm. 862, 865, 43 L. ed. 191 (1898). The nature of such provisions was extensively discussed in *Turner v. Maryland*, 107 U. S. 38, 49, 2 Supm. 44, 53, 27 L. ed. 370 (1883), affirming 55 Md. 240 (1881), where was sustained a statute prohibiting carrying out of the State in hogsheads any tobacco raised in the State, except in hogsheads inspected in a manner prescribed, such inspection being for the purpose of ascertaining whether the tobacco was packed in hogsheads of prescribed dimensions, whether raised in the State, packed in the county or neighborhood where grown, and whether marked in a prescribed manner. It was held no objection that there was no provision for opening the package containing the tobacco and examining its contents. See also as to such provisions *Gibbons v. Ogden*, 9 Wheat. 1, 119, 203, 6 L. ed. 23 (1824).

⁵² In *New Mexico ex rel. McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 27 Supm. 1, 51 L. ed. 78 (1906), affirming *Territory ex rel. v. Denver & Rio Grande R. R. Co.*, 12 N. M. 425, 78 Pac. 74, 79 Pac. 295 (1904), a provision for inspection of hides was sustained as designed "to prevent the criminal or fraudulent appropriation of cattle," by furnishing "some evidence, at least, tending to identify the ownership of the cattle." In this view the provision is sustainable as an incident of the power of the State to protect the interests of owners of cattle.

⁵³ As to discrimination under guise of such inspection, see *Turner v. Maryland* (107 U. S. 56, 2 Supm. 59); *New Mexico ex rel. McLean v. Denver & Rio Grande R. R. Co.*, *supra*.

absolutely necessary for executing its inspection laws.”⁵⁴

§ 95. Quarantine regulations.

Such power of regulation by a State is conspicuously illustrated in case of its unquestionable power, in the absence of conflicting legislation by Congress, to establish quarantine regulations, that is, regulations for the purpose of enforcing quarantine,⁵⁵ whether as

⁵⁴ Art. 1, § 10. See *Gibbons v. Ogden*, *supra*; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, *supra*; *New Mexico ex rel. McLean v. Denver & Rio Grande R. R. Co.*, *supra*.

⁵⁵ *Compagnie Francaise de Navigation, etc. v. Louisiana State Board of Health*, 186 U. S. 380, 387, 22 Supm. 811, 814, 46 L. ed. 1209 (1902), affirming 51 La. Ann. 645, 25 So. 591, 56 L. R. A. 795, 72 Am. St. Rep. 458 (1899), where a Louisiana statute providing that in case of a locality becoming infected with contagious or infectious disease the State board of health might “in its discretion prohibit the introduction into any infected portion of the State persons acclimated, unacclimated or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease,” was sustained as applied to the exclusion of healthy persons from a locality infested with a contagious or infectious disease, whether coming from within or without the State. Such statute as thus applied was held not void as in conflict with acts of Congress relating to foreign immigration and quarantine.

In *Smith v. St. Louis & Southwestern Ry. Co.*, 181 U. S. 248, 21 Supm. 603, 45 L. ed. 847 (1901), affirming *St. Louis Southwestern Ry. Co. v. Smith*, 20 Tex. Civ. App. 451, 49 S. W. 627 (1899), were sustained quarantine regulations established under the authority of a statute by which it was declared to be the duty of the State live stock sanitary commission, “upon receipt by them of reliable information of the existence among the domestic animals of the State of any malignant disease, to go at once to the place where any such disease is alleged to exist, and make a careful examination of the animals believed to be affected with any such disease, and ascertain, if possible, what, if any, disease exists among the live stock reported to be affected, and whether the same is contagious or infectious, and if said disease is found

applicable to persons, or to property. Quarantine is defined as "a term, originally of forty days, but now of varying length according to the exigencies of the case, during which a ship arriving in port and known or suspected to be infected with a malignant contagious disease is obliged to forbear all intercourse with the place where she arrives;" or, more broadly, as "the enforced isolation of individuals and certain objects coming, whether by sea or by land, from a place where dangerous communicable disease is presumably or actually present, with a view to limiting the spread

to be of a malignant, contagious, or infectious character, they shall direct and enforce such quarantine lines and sanitary regulations as are necessary to prevent the spread of any such disease. And no domestic animals infected with disease or capable of communicating the same shall be permitted to enter or leave the district, premises, or grounds so quarantined, except by authority of the commissioners."

The same principle was applied in *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 6 Supm. 1114, 30 L. ed. 237 (1886), affirming 36 La. Ann. 666 (1884), in denying relief against the collection of fees allowed for the examination required in regard to vessels passing a quarantine station. And charges incurred in the enforcement of quarantine regulations were sustained in *Minneapolis, St. P. & S. S. M. Ry. Co. v. Milner*, *infra*. So in *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113 (1887), of imposition on owner of expense of disinfecting rags.

For other instances of State quarantine regulations sustained, see *City of St. Louis v. McCoy*, 18 Mo. 238 (1853); *City of St. Louis v. Boffinger*, 19 Mo. 13 (1853). So in *Minneapolis, St. P. & S. S. M. Ry. Co. v. Milner*, 57 Fed. 276 (C. C. Mich., 1893), as applicable to passengers from foreign countries having certificates from United States inspector, and to passengers from non-infected countries and localities. So in *Train v. Boston Disinfecting Co.*, *supra*, of provision for disinfection of "all rags arriving at this port from any foreign port."

See as to such regulations article in 2 Harv. Law Rev. 267, 292 (1889), by B. H. Lee; in 25 Am. Law Rev. 45 (1891), by W. H. Cowles.

of the malady.”⁵⁶ The power extends to the regulation of transportation not only of the actually diseased but of what has become exposed to disease.^{56a} Doubtless “whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all State laws on the subject will be abrogated, at least so far as the two are inconsistent.”⁵⁷ But “such power has been allowed to remain in abeyance; and Congress, doubtless in view of the different requirements of different climates and localities, and of the difficulty of framing a general law upon the subject, has elected to permit the several States to regulate the matter of protecting the public health as to themselves seemed best.”⁵⁸ Hence “from an early day the power of the States to enact and enforce quarantine laws” has been recognized by Congress.⁵⁹

⁵⁶ Century Dictionary.

^{56a} *Smith v. St. Louis & Southwestern Ry. Co.*, *supra*.

⁵⁷ *Morgan's Steamship Co. v. Louisiana Board of Health*, *supra* (118 U. S. 464, 6 Supm. 1119).

⁵⁸ *Bartlett v. Lockwood*, 160 U. S. 357, 361, 16 Supm. 334, 335, 40 L. ed. 455 (1896). See also *Morgan's Steamship Co. v. Louisiana Board of Health*, *supra*.

⁵⁹ *Compagnie Francaise de Navigation, etc. v. Louisiana State Board of Health*, *supra*. For references to certain Congressional legislation as showing the intention of Congress to adopt the State quarantine laws, or to recognize the power of the States to pass them, see *Morgan's Steamship Co. v. Louisiana Board of Health*, *supra*. See also *Louisiana v. Texas*, 176 U. S. 1, 21, 20 Supm. 251, 258, 44 L. ed. 347 (1900); *Gibbons v. Ogden*, 9 Wheat. 1, 205, 6 L. ed. 23 (1824); *Minneapolis, St. P. & S. S. M. Ry. Co.*, *supra*. In *Train v. Boston Disinfecting Co.*, *supra*, the regulations in question were held not to interfere with any Federal regulations on the subject. See, however, act of June 19, 1906 (34 Stat. L. 299), “to make more effective the national quarantine.”

§ 96. Transportation of property the subject of common ownership; e. g., game.

The view that the power of a State to prohibit or otherwise regulate transportation within the scope of the commerce clause depends upon whether it has power to prohibit or otherwise regulate production, sale, or use of the subject of transportation, finds no better illustration than in the case of property said to be the subject of "common ownership by all the citizens of the State." Obviously the individual owner of property has, generally speaking, as an incident of ownership, the power to regulate the transportation thereof, whether within or without the State. That is to say, it is for him to determine whether it shall be transported out of the State at all. So in case of property the subject of common ownership by all the citizens of the State, the State as representative of its citizens has, as an incident of such ownership, power to determine whether it shall be transported out of the State. "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose."⁶⁰ This principle has commonly been applied

⁶⁰ *Geer v. Connecticut*, 161 U. S. 519, 530, 16 Supm. 600, 605, 40 L. ed. 793 (1896), affirming *State v. Geer*, 61 Conn. 144, 22 Atl. 1012, 13 L. R. A. 804 (1891). Here was sustained, as applicable to birds lawfully killed in the State during a designated open season, a statute prohibiting "having in possession, with intent to procure the transportation beyond said limits (*i. e.*, of the State), any of such birds (*i. e.*, woodcock, ruffed grouse, or quail) killed within this State." The principle was also applied in *Selkirk v. Stephens*, 72 Minn. 335, 75 N. W. 386, 40 L. R. A. 759 (1898). And see *Re Schwartz*, 119 La. —, 44 So. 20 (1907). So as to fish, *Organ v. State*, 56 Ark. 267, 19 S. W. 840 (1892); *State v. Northern Pacific Express Co.*, 58 Minn. 403, 59 N. W. 1100 (1894); though see *Territory v. Nelson*, 2 Idaho, 651, 23 Pac. 116 (1890); *Territory v. Evans*, 2 Idaho, 658, 23 Pac. 115, 7 L. R. A. 288 (1890). So as to oysters, *State v. Harrub*, 95 Ala. 176,

to game and the like, but its application is by no means necessarily confined to such cases.⁶¹

§ 97. The same; transportation into State.

The power of the State to prohibit or otherwise regulate transportation *into* the State of property which if already there within would be the subject of "common ownership by all the citizens of the State" seems not so clear. As in case of transportation out of the State, the question has commonly arisen as to game and the like. But here, prior to transportation into the State, the property in question is obviously not yet the subject of a common ownership by "all the citizens of the State," and it seems clear enough that the power to prohibit or otherwise regulate transportation into the State cannot rest on the same ground as

10 So. 752, 15 L. R. A. 761, 36 Am. St. Rep. 195 (Dec. T. 1891). And see *State v. Insley*, 64 Md. 28, 20 Atl. 1031 (1885).

See also as to such restrictions *Bennett v. American Express Co.*, 83 Me. 236, 22 Atl. 159, 13 L. R. A. 33, 23 Am. St. Rep. 774 (1891); *American Express Co. v. People*, 133 Ill. 649, 24 N. E. 758, 9 L. R. A. 138, 23 Am. St. Rep. 641 (1890); *State v. Niles*, 78 Vt. 266, 62 Atl. 795, 112 Am. St. Rep. 917 (1906); *People v. Van Pelt*, 130 Mich. 621, 90 N. W. 424 (1902).

But in *State v. Saunders*, 19 Kan. 127, 27 Am. Rep. 98 (1877), such prohibition was held invalid as to game, the killing of which was allowed by statute.

In *McDonald v. Southern Express Co.*, 134 Fed. 252 (C. C. S. C., 1904), such prohibition was held invalid as to fish caught beyond, as well as to those caught within, the State, also being regarded as not enforceable in part, that is, so far as applicable to shad caught within the State. Compare as to regulations applicable to fisheries § 25.

⁶¹ Thus in *McCarter v. Hudson County Water Co.*, 70 N. J. Eq. 524, 61 Atl. 710 (1905), affirmed in 70 N. J. Eq. 695, 65 Atl. 489 (1906), was sustained on the ground of the right to preserve "common property of the public," prohibition against transportation of water of streams, etc., into another State for use therein.

the power to regulate its transportation out of the State.⁶² If sustainable at all, it seems to rest on the

⁶² Thus in *Re Davenport*, 102 Fed. 540 (C. C. Wash., 1900), was held invalid a prohibition of the sale of game as applied to game that had been transported into the State, *Geer v. Connecticut* (see § 96) being distinguished as a case of transportation out of the State.

But such prohibitions were sustained in *People v. O'Neil*, 110 Mich. 324, 68 N. W. 227, 33 L. R. A. 696 (1896); *People v. Lassen*, 142 Mich. 597, 106 N. W. 143 (1906); *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140 (1875); *Stevens v. State*, 89 Md. 669, 43 Atl. 929 (1899); *Commonwealth v. Wilkinson*, 139 Pa. St. 298, 21 Atl. 14 (1891); *Magner v. People*, 97 Ill. 320 (1881); *Merritt v. People*, 169 Ill. 218, 48 N. E. 325 (1897); *State v. Randolph*, 1 Mo. App. 15 (1876); *Commonwealth v. Savage*, 155 Mass. 278, 29 N. E. 468 (1892); *Re Deininger*, 108 Fed. 623 (C. C. Oreg., 1901). So in *Jevins v. U. S.*, 11 App. Cas. (D. C.) 345 (1897), of act of Congress as applied to District of Columbia. See *State v. Judy*, 7 Mo. App. 524 (1879).

It was regarded as unnecessary to pass on the point in *People ex rel. v. Hesterberg*, 184 N. Y. 126, 76 N. E. 1032, 3 L. R. A. N. S. 163 (1906), reversing 109 App. Div. 295, 96 N. Y. Suppl. 286 (1905). See *People v. Bootman*, 180 N. Y. 1, 72 N. E. 505 (1904), affirming 95 App. Div. 469, 88 N. Y. Suppl. 887 (1904); *People v. Buffalo Fish Co.*, 164 N. Y. 93, 58 N. E. 34, 52 L. R. A. 803, 79 Am. St. Rep. 622 (1900), affirming 45 App. Div. 631, 62 N. Y. Suppl. 1143 (1899), which affirmed 30 Misc. 130, 62 N. Y. Suppl. 543 (1899). See also *People v. Booth*, 42 Misc. 321, 86 N. Y. Suppl. 272 (1903); reversed in 105 App. Div. 184, 93 N. Y. Suppl. 425 (1905); *People v. Waldorf-Astoria Hotel Co.*, 118 App. Div. 723, 103 N. Y. Suppl. 434 (1907); *Dieterich v. Fargo*, 119 App. Div. 315, 104 N. Y. Suppl. 334 (1907).

In *Phelps v. Racey*, for instance, the prohibition was applied to game brought from a State where the killing was lawful, though in *Magner v. People*, for instance, it appeared that it was killed and possessed in the other State in violation of the law thereof.

But as to game the questions involved in these decisions have, generally speaking, been settled by the act of Congress of May 25, 1900 (31 Stat. L. 187), providing that game "transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of

more doubtful ground that by reason of the practical difficulty of distinguishing what has been transported into the State from what has not, the possession of the power to regulate transportation into the State is a reasonable incident of, if not essential for, the complete exercise of control over what is already within the State, and the subject of "common ownership by all the citizens of the State."⁶³ Of course a different principle already considered is involved in sustaining restrictions upon the ground of there having been broken the "original package" in which property has been transported.⁶⁴

such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Effect was given to such act in *Cameron v. Territory*, 16 Okla. 634, 86 Pac. 68 (1906); *Wells, Fargo & Co. Express v. State*, 79 Ark. 349, 96 S. W. 189 (1906); *State v. Heger*, 194 Mo. 707, 93 S. W. 252 (1906). See also *U. S. v. Thompson*, 147 Fed. 637 (D. C. N. D., 1906); *State v. Shattuck*, 96 Minn. 45, 104 N. W. 719 (1905). In *People ex rel. v. Hesterberg*, *supra*, such act was held applicable to importation from a foreign country, as well as from another State. See other New York decisions *supra*. Compare as to "Wilson act," § 99. As to prohibition of act of May 25, 1900, *supra*, against transportation of "the dead bodies or parts thereof of any wild animals or birds where such animals or birds have been killed in violation of the laws of the State, Territory, or district in which the same were killed," see *U. S. v. Smith*, 115 Fed. 423 (D. C. Pa., 1902).

⁶³ Thus as to game such prohibitions have commonly been sustained as applicable during the continuance of a prohibited or "closed" season within the State for such game. See *State v. Randolph*, *People v. O'Neil*, and other decisions, note 62, *supra*.

⁶⁴ It was upon such ground that restrictions as to game seem to have been sustained in, for instance, *Ex parte Maier*, 103 Cal. 476, 487, 37 Pac. 402, 405, 42 Am. St. Rep. 129 (1894); *Roth v. State*, 51 Ohio St. 209, 37 N. E. 259, 46 Am. St. Rep. 566 (1894). But in *Stevens v. State*, *supra*, the prohibition was

§ 98. Transportation of intoxicating liquors.

It is established that it is within the power of a State to prohibit the manufacture and sale of intoxicating liquors for general use as a beverage.⁶⁵ As

distinctly sustained as applicable to importation and sale in the original package, and elsewhere as in *People v. O'Neil*, *supra*; *Magner v. People*, *supra*; *State v. Randolph*, *supra*, restrictions have been sustained without reference to the original package doctrine. See also *State v. Schuman*, 36 Oreg. 16, 58 Pac. 661, 47 L. R. A. 153, 78 Am. St. Rep. 754 (1899).

⁶⁵ *Mugler v. Kansas*, 123 U. S. 623, 8 Supm. 273, 31 L. ed. 205 (1887). See *Bowman v. Chicago & Northwestern Ry. Co.*, *infra*; *Leisy v. Hardin*, 135 U. S. 100, 122, 10 Supm. 681, 689, 34 L. ed. 128 (1890). Thus even as to liquors the importation of which has been authorized by Congress. *The License Cases*, 5 How. 504, 12 L. ed. 256 (Jan. T. 1847). So notwithstanding obtaining of license and payment of tax under internal revenue acts. *Commonwealth v. Holbrook*, 10 Allen (Mass.), 200 (1865); *Pierson v. State*, 39 Ark. 219 (Nov. T. 1882).

As to Alabama "dispensary law" see *Sheppard v. Dowling*, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68 (Nov. T. 1899); South Carolina "dispensary law," *Ex parte Loeb*, 72 Fed. 657 (C. C. S. C., 1896); *Donald v. Scott*, 76 Fed. 554, 559 (C. C. S. C., 1895); *Bluthenthal v. Southern Ry. Co.*, 84 Fed. 920 (C. C. Ga., 1898).

The general rule forbidding discrimination against the products of another State or country or against a nonresident producer or seller (see § 78) applies to intoxicating liquors in common with other property generally. See, for instance, *Walling v. Michigan*, 116 U. S. 446, 6 Supm. 454, 29 L. ed. 691 (1886), reversing *People v. Walling*, 53 Mich. 264, 18 N. W. 807 (1884). In *Kohn v. Melcher*, 29 Fed. 433 (C. C. Iowa, 1887), however, was sustained a restriction upon the right to sell liquors for mechanical and other legal purposes to citizens of the State, it appearing that it was adopted "not for the purpose of securing an undue advantage to the citizens of the State, but for the purpose of preventing violations of the prohibitory law of the State."

And provisions imposing restrictions upon the sale of such liquors have been sustained by holding inoperative provisions for discrimination. Thus in *Ex parte Kinnebrew*, 35 Fed. 52 (C. C. Ga., 1888); *Powell v. State*, 69 Ala. 10 (Dec. T. 1881); *McCreary v. State*, 73 Ala. 480 (Dec. T. 1883); *Bogan v. State*, 84 Ala.

with the power, generally, to prohibit the production, sale, or use of articles possessing deleterious qualities, or to prohibit fraud or deception in sales, or the sale of adulterated articles, it would seem to clearly follow that the power to prohibit or otherwise regulate the manufacture and sale of intoxicating liquors includes, as an incident, the power to prohibit transportation thereof within the scope of the commerce clause, thus, into the State. But, surprising as it may appear, and with what seems to be a strange inconsistency, the contrary seems well established, namely, that "the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress; and hence that a State law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States."⁶⁶ This surprising result was obviously

449, 4 So. 355 (Dec. T. 1887); *State v. Marsh*, 37 Ark. 356 (Nov. T. 1881); *State v. Deschamp*, 53 Ark. 490, 14 S. W. 653 (1890); *Commonwealth v. Petranich*, 183 Mass. 217, 66 N. E. 807 (1903). See also *Tiernan v. Rinker*, 102 U. S. 123, 26 L. ed. 103 (Oct. 1880); *Cox v. Texas*, 202 U. S. 446, 26 Supm. 671, 50 L. ed. 1099 (1906); *Weil v. Calhoun*, 25 Fed. 865, 873 (C. C. Ga., 1885); *State v. Stucker*, 58 Iowa, 496, 12 N. W. 483 (1882); *State v. Nash*, 97 N. C. 514, 2 S. E. 645 (1887); *Stevens v. State*, 61 Ohio St. 597, 56 N. E. 478 (1899); *Glover v. State*, 126 Ga. 594, 55 S. E. 592 (1906). See, however, *Vines v. State*, 67 Ala. 73 (Dec. T. 1880).

⁶⁶ *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 444, 18 Supm. 674, 676, 42 L. ed. 1100 (1898). So held in *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 8 Supm. 689, 1062, 31 L. ed. 700 (1888), of a prohibition against a carrier bringing such liquors into the State, though from a consideration of such provision, with reference to the system of legislation of which it formed a part, it appeared that it had been adopted "not expressly for the purpose of regulating commerce between its citi-

reached under the influence of the fallacious supposition that it was enough to establish that intoxicating liquors are "*articles of commerce*,"⁶⁷ this misleading use of words aiding in causing to be overlooked the force of the argument, that even if "*articles of commerce*," *they are articles of commerce, the production and sale of which a State may absolutely prohibit*, the power to prohibit the transportation thereof, even into the State, being a proper, even if not absolutely necessary, incident, as in the other cases already considered.

zens and those of other States, but as subservient to the general design of protecting the health and morals of its people, and the peace and good order of the State, against the physical and moral evils resulting from the unrestricted manufacture and sale within the State of intoxicating liquors." The case was regarded as concluded by *Walling v. Michigan*, 116 U. S. 446, 6 Supm. 454, 29 L. ed. 691 (1886). *The License Cases*, 5 How. 504, 12 L. ed. 256 (Jan. T. 1847), were here considered at length and distinguished, and the result of the judgment therein stated. In *O'Neil v. Vermont*, 144 U. S. 323, 12 Supm. 693, 36 L. ed. 450 (1892), dismissing writ of error from *State v. O'Neil*, 58 Vt. 140, 2 Atl. 686, 56 Am. St. Rep. 557 (1885), such a prohibition seems to have been held applicable to transportation into the State, but objection on this point was overruled on the ground that it had not been taken below.

For recognition or application of the doctrine, see *Ex parte Loeb*, 72 Fed. 657 (C. C. S. C., 1896); *Re Lebolt*, 77 Fed. 587 (C. C. Ill., 1896); *Sternweis v. Stilsing*, 52 N. J. Law, 517, 20 Atl. 65 (1890).

Of doubtful authority seem *Commonwealth v. Zell*, 138 Pa. St. 615, 21 Atl. 7, 11 L. R. A. 602 (1891); *Commonwealth v. Silverman*, 138 Pa. St. 642, 21 Atl. 13 (1891), holding the doctrine inapplicable to sales to "persons of known intemperate habits."

But in *Crigler v. Commonwealth*, 120 Ky. 512, 87 S. W. 276 (1905), such a prohibition was held applicable to liquor manufactured in the State and sent out of it "for the purpose of imparting to it the quality of interstate commerce and of then reshipping it into the State to customers," this being regarded as "a mere device to evade the laws of the State."

⁶⁷ See § 88.

But though a State may not impose restrictions upon the transportation of liquors thereinto, it seems within its power to deny the right of recovery in its courts for the price of liquors thus transported.⁶⁸

§ 99. The same; "Wilson act."

The establishment of the doctrine just considered led to the enactment by Congress of a statute commonly known as the "Wilson act," and thus providing: "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."⁶⁹

⁶⁸ Such recovery was not allowed in *Corbin v. Houlehan*, 100 Me. 246, 61 Atl. 131, 70 L. R. A. 568 (1905), reaffirming *Knowlton v. Doherty*, 87 Me. 518, 33 Atl. 18, 47 Am. St. Rep. 349 (1895). To the same effect, *Boehm v. Allen*, 66 Atl. 474 (Supm. Ct. Me., 1906). See also *Meservey v. Gray*, 55 Me. 540 (1867); *Barrett v. Delano*, 14 Atl. 288 (Supm. Ct. Me., 1888); *Brown v. Wieland*, 116 Iowa, 711, 89 N. W. 17, 61 L. R. A. 417 (1902); *Westheimer v. Habinck*, 131 Iowa, 643, 109 N. W. 189 (1906); *Westheimer v. Weisman*, 60 Kan. 753, 57 Pac. 969 (1899).

In *Bluthenthal v. McWhorter*, 131 Ala. 642, 31 So. 559 (Nov. T. 1901), it was in view of the "Wilson act" (see § 99) that such recovery was not allowed. See *Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109 (1897); *Beverwick Brewing Co. v. Oliver*, 69 Vt. 323, 37 Atl. 1110 (1897).

Corbin v. McConnell, 71 N. H. 350, 52 Atl. 447 (1902), where such recovery was allowed, was in *Corbin v. Houlehan*, *supra*, distinguished on the ground of difference in the statutes involved.

⁶⁹ Act of August 8, 1890 (26 Stat. L. 313). This seems in accordance with the suggestion that had been made in *Leisy v.*

Assuming the restrictions here indicated to be not otherwise within the power of the States, the Wilson act is clearly invalid as a delegation to the States of the constitutional power of Congress, though it has been judicially established to be valid.⁷⁰ It is only "upon arrival in" the State that the liquors become subject to its laws.⁷¹ And such arrival is not mere

Hardin, 135 U. S. 100, 123, 10 Supm. 681, 689, 34 L. ed. 128 (1890).

⁷⁰ So held in *Re Rahrer*, 140 U. S. 545, 11 Supm. 865, 35 L. ed. 572 (1891), reversing 43 Fed. 556, 10 L. R. A. 444 (C. C. Kan., 1890), and giving effect to a statute prohibiting the sale of liquors, as applied to a sale in the original package of liquor transported from another State. It may be conceded that the practical effect of the decision in *Re Rahrer* was beneficial as a correction of the judicial mistake perpetrated in *Leisy v. Hardin*, but the device of correcting one such mistake by the perpetration of another seems, to say the least, a somewhat awkward one. And a State statute in existence at the time of the enactment of the Wilson act became effective without re-enactment, *Id.*; *Tinker v. State*, 90 Ala. 638, 8 So. 814 (Nov. T. 1890-91. See as to effect upon original packages in State at such time). In *Rhodes v. Iowa*, 170 U. S. 412, 426, 18 Supm. 664, 669, 42 L. ed. 1088 (1898), it was said to be "unnecessary to consider whether, if the act of Congress had submitted the right to make interstate commerce shipments to State control, it would be repugnant to the Constitution."

See as to application of such act *Re Spickler*, 43 Fed. 653, 10 L. R. A. 446 (C. C. Iowa, 1890); *Re Van Vliet*, 43 Fed. 761, 10 L. R. A. 451 (C. C. Ark., 1890); *Re Jordan*, 49 Fed. 238 (D. C. Iowa, 1892); *Bailey Liquor Co. v. Austin*, 82 Fed. 785 (C. C. S. C., 1897); *Plumb v. Christie*, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181 (1898); *Fred Miller Brewing Co. v. Stevens*, 102 Iowa, 60, 71 N. W. 186 (1897); *Commonwealth v. Calhane*, 154 Mass. 115, 27 N. E. 881 (1891); *State v. Lord*, 66 N. H. 479, 29 Atl. 556 (1891); *State v. Fraser*, 1 N. D. 425, 48 N. W. 343 (1891); *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241 (1897); *Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109 (1897).

⁷¹ In *Foppiano v. Speed*, 199 U. S. 501, 26 Supm. 138, 50 L. ed. 288 (1905), affirming 113 Tenn. 167, 82 S. W. 222 (1904), was

arrival at the State line; it must be arrival at the destination within the State, coupled with delivery to the consignee.⁷² Yet, in a sense, such liquors become

sustained under the act a tax for the privilege of selling liquor though on a vessel (ferry-boat) engaged in interstate transportation. To the same effect, *Harrell v. Speed*, 113 Tenn. 224, 81 S. W. 840, 1 L. R. A. N. S. 639, 106 Am. St. Rep. 814 (1904). In *Foppiano v. Speed* was distinguished *State v. Frappart*, 31 La. Ann. 340 (1879), as decided prior to the Wilson act. See also *Pierson v. State*, 39 Ark. 219 (Nov. T. 1882).

As to effect of re-enactment of State statute subsequently to taking effect of Wilson act, see *State v. Kibling*, 63 Vt. 636, 22 Atl. 613 (1891).

⁷² *Heyman v. Southern Ry. Co.*, 203 U. S. 270, 27 Supm. 104, 51 L. ed. 178 (1906), reversing *Southern Ry. Co. v. Heymann*, 118 Ga. 616, 45 S. E. 491 (1903). Here it was held insufficient that such liquors had been placed in a warehouse of the carrier in readiness for the call of the consignees, but without delivery to them. It did not appear that they had been notified of such arrival. Here was explained and reaffirmed *Rhodes v. Iowa*, *supra*. And see *American Express Co. v. Iowa*, 196 U. S. 133, 25 Supm. 182, 49 L. ed. 417 (1905), reversing *State v. American Express Co.*, 118 Iowa, 447, 92 N. W. 66 (1902); *Adams Express Co. v. Iowa*, 196 U. S. 147, 25 Supm. 185, 49 L. ed. 424 (1905). *Heyman v. Southern Ry. Co.* was followed under like conditions in *State v. Intoxicating Liquors*, 67 Atl. 312 (Supm. Ct. Me., 1907). See *State v. Intoxicating Liquors*, 101 Me. 430, 64 Atl. 812 (1906). In the decision below in *Heyman v. Southern Ry. Co.* was applied *Southern Express Co. v. State*, 114 Ga. 226, 39 S. E. 899 (1901). And see to like effect *State v. Intoxicating Liquors*, 95 Me. 140, 49 Atl. 670 (1901); *State v. Intoxicating Liquors*, 96 Me. 415, 52 Atl. 911 (1902). Compare *State v. Creeden*, 78 Iowa, 556, 43 N. W. 673, 7 L. R. A. 295 (1889).

So in *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 451, 18 Supm. 674, 679, 42 L. ed. 1100 (1898), transportation into the State for one's personal use was held not subject to the imposition of conditions wholly incompatible with and repugnant to the exercise of the right of transportation. As to effect of such decision, see *Heyman v. Southern Ry. Co.*, *supra*. See previous decision in *W. A. Vandercook Co. v. Vance*, 80 Fed. 786 (C. C. S. C., 1897), and to like effect under same statute, *State v. McGee*, 55

“subject to the operation and effect of the laws” of the State, even before such arrival, it being established that, though as already seen, the rule is otherwise as to other property generally, it is within the power of the State to impose restrictions upon a contract for the sale of liquor to be, for the purpose of performing the contract, transported from a point without to a point within the State. As already seen such contracts are commonly entered into by agents (such as those traveling agents popularly characterized as “drummers”) of the producers or dealers, and commonly the restriction is in the form of a tax or fee upon such

S. C. 247, 33 S. E. 353, 74 Am. St. Rep. 741 (1899). See also *Re Langford*, 57 Fed. 570 (C. C. S. C., 1893); *State v. Moody*, 70 S. C. 56, 49 S. E. 8 (1904); *State v. Holleyman*, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567 (1899). As to seizure, before unloading, of vessel transporting liquors into State, see *Ex parte Jervey*, 66 Fed. 957 (C. C. S. C., 1895); *Jervey v. The Carolina*, 66 Fed. 1013 (C. C. S. C., 1895).

See also as to exemption from operation and effect of laws of State “before arrival” therein *Ex parte Edgerton*, 59 Fed. 115 (C. C. S. C., 1893); *Crescent Liquor Co. v. Platt*, 148 Fed. 894 (C. C. W. Va., 1906); *Commonwealth v. Illinois Cent. R. Co.*, 101 S. W. 894 (Ct. App. Ky., 1907); *Cincinnati, N. O. & T. P. R. Co. v. Commonwealth*, 104 S. W. 394 (Ct. App. Ky., 1907); *State v. Intoxicating Liquors*, 94 Me. 335, 47 Atl. 531 (1900); *State v. Intoxicating Liquors*, 98 Me. 464, 57 Atl. 798 (1904); *State v. Intoxicating Liquors*, 66 Atl. 393 (Supm. Ct. Me., 1906); *Sloman v. William D. C. Moebs Co.*, 139 Mich. 334, 102 N. W. 854 (1905); *Donley v. State*, 89 S. W. 553 (Tex. Crim. App. 1905).

In *Heyman v. Southern Ry. Co.*, *supra*, it was regarded as unnecessary to determine the effect of such liquors being “designedly left in the hands of the carrier for an unreasonable time” after arrival and notice and full opportunity to receive them. See also *State v. Intoxicating Liquors*, 94 Me. 335, 47 Atl. 531 (1900). In *Adams Express Co. v. Kentucky*, 206 U. S. 129, 27 Supm. 606, 51 L. ed. 987 (1907), however, *Heyman v. Southern Ry. Co.* was followed as applicable to a case where the carrier retained custody of the liquors at the request of the consignee.

agent.⁷³ A further limitation upon the operation and effect of such laws of a State is that they must be such

⁷³ The rule has already been considered in its general aspects. See §§ 75, 75a. It was held still applicable to intoxicating liquors, notwithstanding the Wilson act, in *Ex parte Loeb*, 72 Fed. 657 (C. C. S. C., 1896).

Such a restriction was sustained in *Delamater v. South Dakota*, 205 U. S. 93, 27 Supm. 447, 51 L. ed. 724 (1907), affirming *State v. Delamater*, 104 N. W. 537, 8 L. R. A. N. S. 774 (Supm. Ct. S. D., 1905). To like effect, *Hart v. State*, 87 Miss. 171, 39 So. 523, 112 Am. St. Rep. 437 (1905). See also *Stevens v. State*, 93 Fed. 793 (C. C. Ohio, 1899); *Westheimer v. Weisman*, 8 Kan. App. 75, 54 Pac. 332 (1898), reversed in 60 Kan. 753, 57 Pac. 969 (1899).

On this point seem overruled *Re Bergen*, 115 Fed. 339 (C. C. Kan., 1900); *Moog v. State*, 145 Ala. 75, 41 So. 166 (1906); *Ex parte Massey*, 92 S. W. 1086 (Tex. Crim. App. 1906); *Corbin v. McConnell*, 71 N. H. 350, 52 Atl. 447 (1902); *State v. Hanaphy*, 117 Iowa, 15, 90 N. W. 601 (1902); *State v. Hickox*, 64 Kan. 650, 68 Pac. 35 (1902).

See also *Eager Co. v. Burke*, 74 Conn. 534, 51 Atl. 544 (1902); *Durkee v. Moses*, 67 N. H. 115, 23 Atl. 793 (1891); *Dunbar v. Locke*, 62 N. H. 442 (1883); *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384 (1886); *State v. Lichtenstein*, 44 W. Va. 99, 28 S. E. 753 (1897).

In *Adams Express Co. v. Kentucky*, 206 U. S. 129, 27 Supm. 606, 51 L. ed. 987 (1907), reversing 87 S. W. 1111 (Ct. App. Ky., 1905), a shipment without previous order from the consignee was nevertheless held within the scope of the commerce clause so that the carrier was not subject to criminal liability for delivery to the consignee, it appearing that such shipment and delivery were in the usual course of its business. It was, however, not denied that "the fact that the consignee did not order a shipment might be evidence for a jury to consider upon the question whether the company was not in addition to its express business also selling liquor contrary to the statutes." To the same effect, *Adams Express Co. v. Kentucky*, 206 U. S. 138, 27 Supm. 608, 51 L. ed. 992 (1907), reversing 92 S. W. 932, 5 L. R. A. N. S. 630 (Ct. App. Ky., 1906); *American Express Co. v. Kentucky*, 206 U. S. 139, 27 Supm. 609, 51 L. ed. 993 (1907), reversing 97 S. W. 807 (Ct. App. Ky., 1906); *Adams Express Co. v. Commonwealth*, 103 S. W. 352 (Ct. App. Ky., 1907); *State v. Kenney*, 57 S. E. 823 (Supm. Ct. App. W. Va., 1907). See also *State v. Smith*, 56 S. E. 528 (Supm. Ct. App. W. Va., 1907); *Adams Express Co. v. Commonwealth*, 103 S. W. 721 (Ct. App. Ky., 1907).

as are "enacted in the exercise of its police powers."⁷⁴ To bring a law within such description it is not necessary that it prohibit the sale, but it may be sufficient, though merely imposing restrictions thereon,⁷⁵ thus,

⁷⁴ That it is no objection to a law enacted in the exercise of such power, that it indirectly operates as a restriction upon transportation within the scope of the commerce clause as, indeed, it necessarily must as a rule, see *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 30, 25 Supm. 552, 555, 49 L. ed. 925 (1905), affirming 120 Fed. 144 (C. C. Mo., 1903).

⁷⁵ Thus, in *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 447, 18 Supm. 674, 677, 42 L. ed. 1100 (1898), was sustained the so-called "dispensary law" of South Carolina, conferring on State officers or agents the exclusive right to buy all liquor to be sold in the State, and to sell the same. See also *South Carolina v. U. S.*, 199 U. S. 437, 454, 465, 26 Supm. 110, 113, 118, 50 L. ed. 261 (1905); *Stevens v. State*, 61 Ohio St. 597, 56 N. E. 478 (1899).

In *Scott v. Donald*, 165 U. S. 58, 17 Supm. 265, 41 L. ed. 632 (1897), a like law of the same State had been held unconstitutional, but, as explained in *Vance v. W. A. Vandercook Co.*, this decision rests on the ground of discrimination against the products of other States, a feature not existing in the statute under consideration in the later decision. See previous decisions in *Donald v. Scott*, 67 Fed. 854 (C. C. S. C., 1895); 74 Fed. 859 (C. C. S. C., 1896). See also *Ex parte Jervey*, 66 Fed. 957 (C. C. S. C., 1895); *Moore v. Bahr*, 82 Fed. 19 (C. C. S. C., 1897); *State v. Potterfield*, 47 S. C. 75, 25 S. E. 39 (1896). As to previous legislation in same State, see *Cantini v. Tillman*, 54 Fed. 969 (C. C. S. C., 1893); *Re Langford*, 57 Fed. 570 (C. C. S. C., 1893); *McCullough v. Brown*, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410 (1894); *State v. Aiken*, 42 S. C. 222, 249, 20 S. E. 221, 231, 26 L. R. A. 345, 358 (1894).

In *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 25 Supm. 552, 49 L. ed. 925 (1905), affirming 120 Fed. 144 (C. C. Mo., 1903), was sustained a statute providing generally for the inspection of beer and malt liquors manufactured and sold in the State, and containing a provision that upon receipt of and before offering for sale "any beer or other malt liquors other than those manufactured in this State," there should be furnished the inspector an affidavit as to the materials used in manufacture of such liquor, the inspector to inspect or label the packages containing

by way of imposition of a tax as a condition of engaging in the business of selling.⁷⁶ The imposition of such a tax might, perhaps, under certain conditions be invalid as "a mere arbitrary imposition of a tax," as distinguished from "a license for regulation of the business," but the line of distinction seems but vaguely defined.⁷⁷

the liquors and to receive a fee for his services. Here was followed the decision of the State court in *State v. Bixman*, 162 Mo. 1, 62 S. W. 828 (1901), in sustaining (as to liquor manufactured in the State) the statute as being a police regulation and not a revenue law. There was also overruled the objection that the statute was invalid because it was "denominated in its text as an inspection law, and does not provide an adequate inspection and besides imposes a burden beyond the cost of inspection."

⁷⁶ In *Reymann Brewing Co. v. Brister*, 179 U. S. 445, 21 Supm. 201, 45 L. ed. 269 (1900), affirming 92 Fed. 28 (C. C. Ohio, 1899), was sustained the imposition of a tax for each place where the business was carried on. Here was adopted the construction by the State court of the law as "aiming at controlling and regulating sales in quantities less than one gallon in saloons or at places other than the place of manufacture, and being, therefore, within the scope of the police power." Applied under like conditions in *People v. Voorhis*, 131 Mich. 398, 91 N. W. 624 (1902). So in *Mayor, etc., of New Iberia v. Erath*, 118 La. 306, 42 So. 945 (1907), was sustained imposition of license tax. See *City of Mobile v. Phillips*, 146 Ala. 158, 40 So. 826 (1906); *Delamater v. South Dakota*, 205 U. S. 93, 27 Supm. 447, 51 L. ed. 724 (1907).

⁷⁷ In *Duluth Brewing & Malting Co. v. City of Superior*, 123 Fed. 353, 59 C. C. A. 481 (7th C. 1903), was sustained the imposition of a license fee, it not being "so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a tax and not as a license for the regulation of the business." See also *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. 258 (C. C. S. D., 1900). So in *Meyer v. City of Mobile*, 147 Fed. 843 (C. C. Ala., 1906), there not clearly appearing a purpose "to exact a tax, and not to impose a license for regulation."

But in *Pabst Brewing Co. v. City of Terre Haute*, 98 Fed. 330 (C. C. Ind., 1899), was held invalid, as an exercise of the taxing power, the imposition of a license fee upon a brewery or depot as applied to storage of liquors while in the original package.

§ 100. Conduct and liability of those engaged in transportation.

As will presently appear in detail, while it is clear enough that under certain conditions it is within the power of a State to regulate the conduct and liability of those engaged in transportation within the scope of the commerce clause, it is equally clear that such power is not without limit. But it seems by no means clearly established what are the conditions under which such power may be exercised. As a rule there has in any given case been little or no consideration of the question *for whose benefit such conduct or liability is regulated*.⁷⁸ Yet herein seems to us to lie the solution of the problem. There are at least three classes of persons for whose benefit such conduct or liability may be regarded as regulated: (1) That vague class known as the "public," which for present purposes may be regarded as comprehending those residing or sojourning in the State; (2) those enjoying the benefit of transportation *wholly within the State*; (3) those enjoying the benefit of transportation *within the scope of the commerce clause*. It will be found that for the benefit of the first class such power to regulate exists to a large extent, and that, so far as the commerce clause is concerned, such power to regulate for the benefit of the second class is, generally speaking, without definite limit. The difficulty chiefly arises as to the third class. It will be found that while there is a

Here was disapproved the contrary decision in *City of Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857 (1894). But imposition of such a fee was sustained in *Schmidt v. City of Indianapolis*, 80 N. E. 632 (Supm. Ct. Ind., 1907), distinguishing *Pabst Brewing Co. v. City of Terre Haute*.

⁷⁸ What is here stated is doubtless in theory applicable to regulation to the *detriment* of any of such classes. But as there is comparatively little or no legislation, directly and ostensibly at least, for that purpose, it may, for the purposes of our discussion, be ignored.

pronounced tendency to deny the existence of the power to regulate for the benefit of such class, no such rule has as yet been clearly established.

§ 101. The same; regulation for benefit of public; e. g., as to speed of trains; transportation on Sabbath.

It is obvious that the complete exercise of what we have seen to be the power of a State to establish, not only regulations "pertaining to the health, morals, or safety of the public," but even such as are "designed merely to promote the *public convenience*" and general welfare⁷⁹ must involve power to regulate the conduct of those engaged in transportation within the scope of the commerce clause. A provision for such regulation is, perhaps, especially sustainable, if of general application, and not having a special application to those engaged in such transportation.⁸⁰ Under this head excellent illustrations are furnished by provisions regulating the speed of railroad trains or other means of transportation,⁸¹ and otherwise the proper scope of such provisions is very broad and not capable of very precise definition.⁸² A rather extreme instance

⁷⁹ See §§ 59, 60.

⁸⁰ See *Hennington v. Georgia*, 163 U. S. 299, 318, 16 Supm. 1086, 1093, 41 L. ed. 166 (1896).

⁸¹ Thus, in *Erb v. Morasch*, 177 U. S. 584, 20 Supm. 819, 44 L. ed. 897 (1900), affirming 60 Kan. 251, 56 Pac. 133 (1899), was sustained a municipal ordinance regulating the speed of railroad trains, even those engaged in transportation within the scope of the commerce clause. So in *Chicago & Alton R. R. Co. v. City of Carlinville*, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391, 93 Am. St. Rep. 190 (1902); *Peterson v. State*, 112 N. W. 306 (Supm. Ct. Neb., 1907). And so of a statute, *Clark v. Boston & Maine R. R.*, 64 N. H. 323, 10 Atl. 676 (1887). So of speed of steamboats, *People v. Jenkins*, 1 Hill (N. Y.), 469 (1841).

⁸² To this head seem referable the following instances of provisions sustained as applicable to those engaged in transportation within the scope of the commerce clause: Requirement that railroad corporation doing business in the State furnish to State

seems the prohibition of transportation on the Sabbath, by way of giving effect to the policy of the State to prohibit labor on that day.⁸³

officials an annual statement of its affairs, *People ex rel. Stead v. Chicago, Indianapolis, etc., Ry. Co.*, 223 Ill. 581, 79 N. E. 144 (1906); that telegraph poles and wires be removed from streets to subways, it being, however, regarded as doubtful whether there could be denied in such case the right to maintain and operate wires upon the structure of an elevated railway, *Western Union Tel. Co. v. Mayor of N. Y.*, 38 Fed. 552, 3 L. R. A. 449 (C. C. N. Y., 1889). To similar effect, *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454, 21 Am. St. Rep. 764 (1891). See also *American Tel. & Tel. Co. v. Harborcreek Township*, 23 Pa. Super. 437 (1903); that telephone poles and wires be removed from a street to an adjoining alley parallel therewith, this on the ground of danger resulting from the decayed condition of the poles and the large number of wires thereon, *Michigan Tel. Co. v. City of Charlotte*, 93 Fed. 11 (C. C. Mich., 1899). See also *City of Richmond v. Southern Bell Tel. Co.*, 85 Fed. 19, 28 C. C. A. 659 (4th C. 1898); *Ganz v. Ohio Postal Tel. Cable Co.*, 140 Fed. 692, 72 C. C. A. 186 (6th C. 1905); prohibition of emission of smoke from smoke stack, as applicable to tug, *Harmon v. City of Chicago*, 110 Ill. 400, 51 Am. Rep. 698 (1884); requirement of use of fire screen attached to smoke stack, *Burrows v. Delta Transp. Co.*, 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468

⁸³ Thus such a prohibition was sustained as applicable to a railroad train laden with interstate freight in *Hennington v. Georgia*, 163 U. S. 299, 16 Supm. 1086, 41 L. ed. 166 (1896), affirming 90 Ga. 396, 17 S. E. 1009 (1892). To like effect, *Seale v. State*, 126 Ga. 644, 55 S. E. 472 (1906); *State v. Southern Ry. Co.*, 119 N. C. 814, 25 S. E. 862, 56 Am. St. Rep. 689 (1896); *State v. (Baltimore & Ohio) R. R. Co.*, 24 W. Va. 783, 49 Am. Rep. 290 (1884); *Norfolk & Western R. Co. v. Commonwealth*, 93 Va. 749, 24 S. E. 837, 34 L. R. A. 105, 57 Am. St. Rep. 827 (1896), overruling *N. & W. R. R. Co. v. Commonwealth*, 88 Va. 95, 13 S. E. 340, 13 L. R. A. 107, 29 Am. St. Rep. 705 (1892).

To the contrary seems *Dinsmore v. N. Y. Board of Police*, 12 Abb. N. C. 436 (N. Y. Super. Ct., Sp. T. 1882), a case of carriage by express.

As to application of Sunday law to bridge over river between States, see *Boland v. Combination Bridge Co.*, 94 Fed. 888 (D. C. Iowa, 1899).

§ 102. The same; for benefit of those enjoying benefit of transportation wholly within State; e. g., prescribing qualifications of those engaged in business of transportation.

It has already been stated that, so far as the commerce clause is concerned, the power to regulate such conduct and liability for the benefit of those enjoying the benefit of transportation *wholly within the State* is, generally speaking, without definite limit. Assuming the absence of power to so regulate for the benefit of those enjoying the benefit of transportation *wholly within the scope of the commerce clause*, a difficulty may arise from the circumstance that a particular means of transportation, for instance, a railroad train,

(1895); regulation to be put upon natural gas, *Jamieson v. Indiana Natural Gas & Oil Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652 (1891), but see to the contrary as to effect of same statute *Benedict v. Columbia Construction Co.*, 49 N. J. Eq. 23, 23 Atl. 485 (1891); requirement that whistle be blown before reaching railroad crossing, *Willfong v. Omaha, etc., R. Co.*, 116 Iowa, 548, 90 N. W. 358 (1902); that railroad be lighted by electricity, *Village of St. Bernard v. C., C., C. & St. L. Ry. Co.*, 4 Ohio Dec. 371 (1896); that electric lights be kept and maintained at certain points where railroad tracks intersected city streets, the purpose being said to be "to add to the security of life and limb," *Pittsburg, C., C. & St. L. Ry. Co. v. Hartford City*, 82 N. E. 787 (Supm. Ct. Ind., 1907); regulation of method of transporting timber along streams, *Craig v. Kline*, 65 Pa. St. 399, 3 Am. Rep. 636 (1870); *Scott v. Wilson*, 3 N. H. 321 (1825); *Harrigan v. Conn. River Lumber Co.*, 129 Mass. 580, 37 Am. Rep. 387 (1880); regulation of liability to employee for negligence, *McGuire v. Chicago, Burlington & Quincy R. R. Co.*, 131 Iowa, 340, 369, 108 N. W. 902, 912 (1906). As to regulation of such liability by Congress, see § 39.

In *Cuban Steamship Co. v. Fitzpatrick*, 66 Fed. 63 (C. C. La., 1895), was held invalid, as without intention "to protect any right, coming even remotely, under the police power," a prohibition against sailors of vessels engaged in foreign commerce loading and unloading their own vessels.

As to license tax for circus exhibition on steamboat, see *Board of Selectmen v. Spalding*, 8 La. Ann. 87 (1853).

is very frequently used indiscriminately for both kinds of transportation. A requirement then as to, for instance, the mode of heating railroad cars, or the qualifications of those in charge of a railroad train, while operating for the benefit of those enjoying the benefit of transportation wholly within the State, almost necessarily also operates by way of regulation of transportation within the scope of the commerce clause. It is clear enough, however, both on principle and on authority, that this additional effect furnishes no necessary objection to exercise of the power, though there seems to be reason for concluding that, in case of a given means of transportation, the amount of transportation wholly within the State may be so incidental or so comparatively small as to furnish insufficient justification for a regulation principally applicable to transportation within the scope of the commerce clause.⁸⁴ A good illustration under this head seems furnished by requirements by way of prescribing the qualifications of those engaged in the business of transportation.⁸⁵ Even as to one thus engaged ex-

⁸⁴ In *State v. Jacksonville Terminal Co.*, 41 Fla. 377, 405, 27 So. 225, 234 (1899) a requirement with reference to furnishing railroad terminal facilities was held justified in view of the amount of local business, though interstate business was incidentally affected.

⁸⁵ Thus, in *Smith v. Alabama*, 124 U. S. 465, 8 Supm. 564, 31 L. ed. 508 (1888), affirming 85 Ala. 341, 6 So. 928 (Dec. T. 1888); *McDonald v. State*, 81 Ala. 279, 2 So. 829, 60 Am. Rep. 158 (Dec. T. 1886), a statute prohibiting an engineer from operating any railroad engine without undergoing an examination and obtaining a license was sustained as to an engineer exclusively employed in interstate business, it not being "in conflict with any express enactment of Congress on the subject." So in *Nashville, Chattanooga, etc., Ry. v. Alabama*, 128 U. S. 96, 9 Supm. 28, 32 L. ed. 352 (1888), affirming 83 Ala. 71, 3 So. 702 (Dec. T. 1887); *Louisville & Nashville R. R. Co. v. Baldwin*, 85 Ala. 619, 5 So. 311, 7 L. R. A. 266 (Dec. T. 1888; see as to requirement that examination be at expense of carrier), of a statute prohibiting serving on

clusively in transportation within the scope of the commerce clause, for instance, an engineer on a locomotive engine exclusively used for such transportation,⁸⁶ it seems obvious that his want of skill or care may operate to the injury of members of the general public, or of those enjoying the benefit of transportation wholly within the State. Thus such want of skill or care might result in collision with another train, or in injury to those lawfully crossing the track. As in case of regulations for the benefit of the public, the proper scope of provisions under this head is very broad and not capable of very precise definition.⁸⁷

railroad lines in certain capacities requiring the use or discrimination of form or color signals, without obtaining a certificate of fitness for the position, after examination. As to provision as to qualification of those managing steam boilers on vessels, see *People v. Prillen*, 73 App. Div. 207, 76 N. Y. Suppl. 821 (1902), reversed in 173 N. Y. 67, 65 N. E. 947 (1903).

⁸⁶ See *Smith v. Alabama*, *supra*.

⁸⁷ To this head seem referable the following instances of provisions sustained as applicable to those engaged in transportation within the scope of the commerce clause, though it may be that some of such instances are referable to the head of regulation for the benefit of the public: Requirement that railroad carrier annually fix and post rates for transportation, *Railroad Co. v. Fuller*, 17 Wall. 560, 21 L. ed. 710 (Oct. 1873), affirming *Fuller v. Chicago & N. W. R. R. Co.*, 31 Iowa, 187 (1871); prohibition of heating of railroad passenger cars by stove or furnace, *N. Y., New Haven & Hartford R. R. Co. v. New York*, 165 U. S. 628, 17 Supm. 418, 41 L. ed. 853 (1897), affirming *People v. N. Y., New Haven, etc., R. R. Co.*, 142 N. Y. 646, 37 N. E. 568 (1894). See previous decision in 55 Hun, 409, 8 N. Y. Suppl. 672 (1890), affirmed in 123 N. Y. 635, 25 N. E. 953 (1890); requirement that blackboards to be placed in stations and of writing thereon as to trains being on time and if late, how much, *State v. Indiana & Illinois Southern R. R. Co.*, 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502 (1892); *State v. Pennsylvania Co.*, 133 Ind. 700, 32 N. E. 822 (1892); limitation of time for which vessel should lie in thoroughfare, also one requiring light at night on anchored vessel, *The James Gray v. The John Fraser*, 21 How. 184, 16 L. ed. 106 (Dec.

§ 103. The same; for benefit of those enjoying benefit of transportation within scope of commerce clause.

While then it is not necessarily any objection to a provision for regulation of the conduct or liability of those engaged in transportation wholly within the State, that by reason of their also being engaged in transportation within the scope of the commerce clause, the latter kind of transportation is incidentally regulated, it should, in our view, seem clear that it is beyond the power of the State to regulate such conduct or liability *solely for the benefit of those enjoying the benefit of transportation within the scope of the commerce clause*. It has already been seen that, as to such transportation, it is beyond the power of the State to regulate the rate thereof.⁸⁸ It seems obvious that, ordinarily at least, this is a case of attempt to regulate the conduct of a carrier *solely for the benefit of those enjoying the benefit of such transportation*. Where shall be drawn the line of distinction between

T. 1858). See also *Steamboat N. Y. v. Rea*, 18 How. 223, 15 L. ed. 359 (Dec. T. 1855); *State v. Fagan*, 22 La. Ann. 545 (1870); requirement that steamboat carry lights at night, *Fitch v. Livingston*, 4 Sandf. (N. Y.) 492 (1851); requirement as to place of anchorage, *Green v. Steamer Helen*, 1 Fed. 916 (D. C. Md., 1880).

For other instances of provisions sustained as applicable to navigation, see *The Clover*, 1 Low. 342, 5 Fed. Cas. No. 2,908 (1869); *The W. H. Beaman*, 45 Fed. 125 (D. C. N. J., 1891); *Tinken v. Stillwagon*, 1 N. Y. City Ct. 390 (1878). See also *Halderman v. Beckwith*, 4 McLean, 286, 11 Fed. Cas. No. 5,907 (1847).

⁸⁸ See § 67. In *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U. S. 557, 7 Supm. 4, 30 L. ed. 244 (1886), the leading authority for this proposition, it was *Hall v. DeCuir*, *infra*, that was followed as obviously applicable. And in the principal dissenting opinion in *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, *infra*, it was in our view unanswerably shown that the regulation there sustained was invalid according to *Hall v. De Cuir* and *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*.

such invalid attempt at regulation, and valid regulation for their benefit? For a time at least the decisions of the Supreme Court seemed to sanction what we submit is the sound rule, that *it is beyond the power of a State to regulate the conduct and liability of those engaged in transportation within the scope of the commerce clause, solely for the benefit of those enjoying the benefit of such transportation.*⁸⁹ In view,

⁸⁹ *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547 (Oct. 1877), reversing *Decuir v. Benson*, 27 La. Ann. 1 (1875), seems based on this sound rule, granting that it may have been misapplied by the court. Here, as applied to a carrier engaged in transportation within the scope of the commerce clause, was held invalid a requirement that persons traveling upon public conveyances be given equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. It was so held even as to a person traveling between points both within the State, the "disposition of passengers taken up and put down within the State" being regarded as "affecting in a greater or less degree" their transportation within the scope of the commerce clause. See explanation of this decision in *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Supm. 934, 40 L. ed. 1105 (1896).

So, as applied to transportation within the scope of the commerce clause have been held invalid requirements of equal but separate accommodations for white and colored passengers. *State v. Judge*, 44 La. Ann. 770, 11 So. 74 (1892); *Carrey v. Spencer*, 36 N. Y. Suppl. 886 (Supm. Ct., Kings Sp. T. 1895); *Hart v. State*, 100 Md. 595, 60 Atl. 457 (1905). So in *Anderson v. Louisville & N. R. R. Co.*, 62 Fed. 46 (C. C. Ky. 1894), a case, indeed, of transportation not only between points both within the State, but so far as appears, upon a train operated wholly between points in the State. The decision was on the ground that, though the State statute might have constitutionally applied to such a case, it was invalid as containing provisions invalid as applicable to transportation within the scope of the commerce clause and inseparable from what might otherwise have been valid. See *Pullman Palace Car Co. v. Cain*, 15 Tex. Civ. App. 503, 40 S. W. 220 (1897). To the contrary, however, *Smith v. State*, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432 (1898). But independently of statute, a carrier may itself make provision for such accommodations, even

however, of later decisions of the court, the contrary and, in our view, utterly unsound rule, must be re-

as applicable to transportation within the scope of the commerce clause, *Chiles v. Chesapeake & O. Ry. Co.*, 101 S. W. 386 (Ct. App. Ky., 1907).

To the rule herein contended for seems also referable *Houston & Texas Central R. R. Co. v. Mayes*, 201 U. S. 321, 26 Supm. 491, 50 L. ed. 772 (1906), reversing 36 Tex. Civ. App. 606, 83 S. W. 53 (1904), in so far as based upon the commerce clause. Here was held invalid, as applied to transportation from a point within to one without the State, a requirement that a carrier comply with a requisition in writing by a shipper of freight of any kind, "for a number of cars to be furnished at any point indicated within a certain number of days from the receipt of the application," the only proviso being that the law "shall not apply in cases of strikes or other public calamity." This overrules, in so far as to the contrary, *Houston & T. C. R. Co. v. Everett*, 86 S. W. 17 (Tex. Civ. App. 1905), reversed on another point in 89 S. W. 761 (Supm. Ct. Tex., 1905). To like effect, *Texas & P. Ry. Co. v. Allen*, 98 S. W. 450 (Tex. Civ. App. 1906). See *Texas & P. Ry. Co. v. Loving*, 98 S. W. 451 (Tex. Civ. App. 1906).

And the following seem to be instances of application of such rule in holding provisions invalid, as applied to transportation within the scope of the commerce clause: Requirement that double-decked cars be furnished for transportation of sheep, *Stanley v. Wabash, St. Louis & Pacific Ry. Co.*, 100 Mo. 435, 13 S. W. 709, 8 L. R. A. 549 (1890); that shipment be made by route designated by shipper, *Lowe v. Seaboard Air Line Ry.*, 63 S. C. 248, 41 S. E. 297, 90 Am. St. Rep. 678 (1902); that shipment be delivered at a point of physical connection with the road of another carrier, *Central Stock Yards Co. v. Louisville & N. R. Co.*, 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213 (6th C. 1902), affirmed in 192 U. S. 568, 24 Supm. 339, 48 L. ed. 565 (1904); that railroad ticket be good for six years with right to stop off at the pleasure of the holder, *Lafarier v. Grand Trunk Ry. Co., of Canada*, 84 Me. 286, 24 Atl. 848, 17 L. R. A. 111 (1892), applying *Carpenter v. Grand Trunk Ry. Co.*, 72 Me. 388, 39 Am. Rep. 340 (1881); abrogation of common-law right of action for exclusion from railroad car, *Brown v. Memphis & C. R. Co.*, 5 Fed. 499 (C. C. Tenn., 1880).

As to requirement of free transportation of shipper of live stock, see *State v. Otis*, 60 Kan. 248, 56 Pac. 14 (1899).

garded as reasonably well established, at least as to certain classes of cases.⁹⁰ Not to speak of the confu-

⁹⁰ This is conspicuously shown in the instances discussed in §§ 104, 105, 105. The same error seems manifested in *Wisconsin, Minnesota & Pacific R. R. v. Jacobson*, 179 U. S. 287, 21 Supm. 115, 45 L. ed. 194 (1900), affirming *Jacobson v. Wisconsin, Minnesota, etc., R. R. Co.*, 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389, 70 Am. St. Rep. 358 (1898), where a statute requiring carriers to provide at points of intersection, etc., facilities by track connections for transferring cars, also facilities for the interchange of cars and traffic and for the receiving, forwarding, and delivering of property, cars, etc., was sustained, as applied to railroad corporation engaged in interstate business, it being said that *this "would plainly afford facilities to interstate commerce, if there were any, and would in nowise regulate such commerce within the meaning of the Constitution."* See *Central Stock Yards Co. v. Louisville & N. R. Co.*, *supra*.

The following are instances of regulations that seem, generally speaking, to have been (in the view herein taken, erroneously) sustained solely for the benefit of those enjoying the benefit of transportation within the scope of the commerce clause: Prohibition of railroad carrier from allowing freight to remain unshipped for more than five days, *Whitehead v. Wilmington & Weldon R. R. Co.*, 87 N. C. 255 (1882); *Bagg v. Wilmington, Columbia, etc., R. R. Co.*, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 26 Am. St. Rep. 569 (1891). See also *Branch v. Wilmington & Weldon R. R. Co.*, 77 N. C. 347 (1877); imposition of duty to receive and forward freight, *Currie v. R. R. Co.*, 135 N. C. 535, 47 S. E. 654 (1904); requirement that freight be delivered upon tender or payment of charges, *Harrill v. Southern Ry. Co.*, 144 N. C. 534, 57 S. E. 382 (1907); definition of liability of railroad corporation drawing cars of other corporations, *Rae v. Grand Trunk Ry. Co.*, 14 Fed. 401 (C. C. Mich., 1882); giving effect to bill of lading, as evidence, *Missouri, Kansas & Texas Ry. Co. v. Simonson*, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248 (1902); provision as to sale by carrier of unclaimed goods, *St. Louis Southwestern Ry. Co. v. Arkansas & T. Grain Co.*, 95 S. W. 656 (Tex. Civ. App. 1906); imposition of liability for insufficiently feeding and watering stock, the default occurring entirely within the State, *Gulf, C. & S. F. Ry. Co. v. Gray*, 24 S.

sion resulting from inconsistency in the decisions, the result is toward an utter breaking down of what we have seen to be the well-defined distinction between *regulation of commerce under the authority of a State* and *the incidental result of the exercise under authority of a State of some reserved power*. This erroneous conclusion seems to have largely resulted from an extremely confused conception of the nature and scope of the so-called "police power" of the State.⁹¹

§ 104. The same; requirements as to stopping trains.

In the view herein taken there is no inherent objection to a requirement, under the authority of a State,

W. 837 (Tex. Civ. App. 1894; see as to effect of U. S. R. S., §§ 4386, 4388, 4389).

As to requirement that railroad depot be kept open a reasonable time before departure of train, see *Hall v. South Carolina Ry. Co.*, 25 S. C. 564 (1886); provision as to failure to redeem tickets or unused portions thereof, *Missouri, K. & T. Ry. Co. of Texas v. Fookes*, 40 S. W. 858 (Tex. Civ. App. 1897). To the same head seem referable the following decisions sustaining provisions for restriction of the privilege of sale of tickets to authorized agents of the carrier: *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329 (1894); s. p., *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238 (1878); *Stedman v. State*, 64 Ind. 597 (1878); *People ex rel. Tyroler v. Warden of City Prison*, 26 App. Div. 228, 50 N. Y. Suppl. 56 (1898), reversed without passing on this point in 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763 (1898); *State v. Thompson*, 47 Oreg. 492, 84 Pac. 476, 4 L. R. A. N. S. 480 (1906); *State v. Bollam*, 47 Oreg. 639, 84 Pac. 479 (1906); *Samuelson v. State*, 116 Tenn. 470, 95 S. W. 1012, 115 Am. St. Rep. 805 (1906). See also *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498 (1894); *Commonwealth v. Wilson*, 14 Phila. (Pa.) 384 (1880); *Commonwealth v. Keary*, 198 Pa. St. 500, 48 Atl. 472 (1901), affirming 14 Pa. Super. 583 (1900).

⁹¹ Such confused conception strikingly appears in the majority opinion in *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, 297, 19 Supm. 465, 470, 43 L. ed. 702 (1899).

that a train employed in transportation within the scope of the commerce clause stop at certain times and places. That is to say, such a requirement may conceivably be justified as for the benefit of those enjoying the benefit of transportation wholly within the State,⁹² though probably there is in practice but little occasion for such a requirement. But it seems clearly established that such a requirement may be justified as for the benefit of those enjoying the benefit of transportation within the scope of the commerce clause,⁹³

⁹² In this view the requirement under consideration in *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, *infra*, would have been justifiable regarded as for the convenience of, for instance, a passenger from Cleveland to Toledo.

⁹³ Thus, in *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, 19 Supm. 465, 43 L. ed. 702 (1899), was sustained, as applicable to trains engaged in transportation between points outside the State (Chicago and Buffalo), but passing through it, a requirement (applicable as well to trains operated wholly within the State) that there stop three passenger trains each way daily "at a station, city, or village containing over 3,000 inhabitants," this being regarded (173 U. S. 301, 19 Supm. 471) as a provision for the convenience of those enjoying the benefit of transportation within the scope of the commerce clause, it being said: "The statute does not stand in the way of the railroad company running as many trains as it may choose between Chicago and Buffalo without stopping at intermediate points, or only at very large cities on the route, if in the contingency named in the statute the required number of trains stop at each place containing 3,000 inhabitants long enough to receive and let off passengers. It seems from the evidence that the average time required to stop a train and receive and let off passengers is only three minutes." Here the carrier was a domestic corporation, though this seems immaterial. See § 65. See also as to effect of U. S. R. S., § 5253. Such a requirement was also sustained in *Railroad Commrs. v. Atlantic Coast Line R. R. Co.*, 74 S. C. 80, 54 S. E. 224 (1906). See also as to requirement that passenger trains (excepting through railroad trains entering the State from any other State and "transcontinental trains") stop at county seats *Gladson v. Minnesota*, 166 U. S. 427, 17 Supm. 627, 41 L. ed. 1064 (1897),

this conclusion being in our view, for reasons already stated, entirely unsound. To what extent such a re-

affirming *State v. Gladson*, 57 Minn. 385, 59 N. W. 487, 24 L. R. A. 502 (1894).

But in *Illinois Central R. R. Co. v. Illinois*, 163 U. S. 142, 16 Supm. 1096, 41 L. ed. 107 (1896), reversing 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119 (1892), was held not sustainable a statute, the effect of which, as sustained and applied by the State court, was "to require a fast mail train, carrying interstate passengers and the United States mail, from Chicago to places south of the Ohio River, over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails, by turning aside from the direct interstate route and running to a station three miles and a half away from a point on that route and back again to the same point, and thus traveling seven miles which form no part of its course, before proceeding on its way, and to do this for the purpose of discharging and receiving passengers at that station, for the interstate travel to and from which the railroad company furnishes other and ample accommodations." This was regarded as unnecessarily interfering with the carriage of the mails. So in *Cleveland, Cincinnati, etc., Ry. Co. v. Illinois*, 177 U. S. 514, 20 Supm. 722, 44 L. ed. 868 (1900), reversing 175 Ill. 359, 51 N. E. 842 (1898), was held not sustainable, as to a train engaged in transportation between St. Louis and New York, an Illinois statute requiring all regular passenger trains to stop a sufficient length of time at county seats to receive and let off passengers with safety. It appeared that the corporation furnished trains that stopped at the county seat in question, sufficient to amply accommodate travel and afford every reasonable facility to such locality; that to require a train to stop at that and similar stations would prevent it from making the time necessary for eastern connections and carrying passengers from St. Louis to New York within the time which the demands of business and interstate traffic required. An identical statute had been sustained and applied in *Chicago & Alton R. R. Co. v. People*, 105 Ill. 657 (1883).

Cleveland, Cincinnati, etc., Ry. Co. v. Illinois was applied under like conditions in *Illinois Cent. R. R. Co. v. Mississippi R. R. Comm.*, 138 Fed. 327, 70 C. C. A. 617 (5th C. 1905), affirmed in *Mississippi R. R. Comm. v. Illinois Central R. R. Co.*, 203 U. S. 335, 27 Supm. 90, 51 L. ed. 209 (1906). To similar effect, *Atlantic Coast Line R. R. Co. v. Wharton*, 207 U. S. 328, 28 Supm. 121 (1907).

quirement is sustainable it seems difficult to determine, though it seems vaguely assumed that it must be "a reasonable provision for the public convenience,"⁹⁴ and is not justified if "all local conditions have been adequately met."⁹⁵

§ 105. Regulation of liability for loss or injury in course of transportation.

It has already been seen that, notwithstanding the doctrine of the exclusiveness of the power of Congress, even in the absence of exercise thereof, it is well established that the existence of such power does not prevent the application even in the courts of a State, as well as in the Federal courts, of merely common-law rules that, if statutory, might be regarded as an invalid exercise of the authority of the State, thus, rules applicable to the duties and liabilities of carriers as to discrimination and negligence.⁹⁶ The artificiality of the distinction that allows a common-law rule to be applied under the authority of a State, but prohibits such application of a statutory rule that may well cover precisely the same ground, seems to have made it more easy to reach the conclusion that it is thus within the power of the State to regulate, for the benefit of those enjoying the benefit of transportation within the scope of the commerce clause, the liability for loss or injury in the course of such transportation. For the reasons already stated, this conclusion is in our view entirely unsound.⁹⁷ In some

⁹⁴ *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, *supra* (173 U. S. 301, 19 Supm. 471).

⁹⁵ *Cleveland, Cincinnati, etc., Ry. Co. v. Illinois*, *supra* (177 U. S. 522, 20 Supm. 725).

⁹⁶ See § 57 and discussion therein of *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, 24 Supm. 132, 48 L. ed. 268 (1903), as overlooking this distinction as applied to carrier's liability for negligence.

⁹⁷ This unsound view seems largely due to the influence of *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. ed. 819 (Oct. 1876), where

instances seems manifested a tendency to base the existence of such power on the circumstance of the par-

a statute giving personal representatives a right of action for death caused by the wrongful act or omission of another was held applicable in sustaining an action for injuries resulting from a collision, happening within the State, between vessels both engaged at the time in transportation within the scope of the commerce clause. To similar effect, *Steamboat Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369 (Dec. 1872). So as to claim for death on high seas resulting from tort, *The Hamilton*, 207 U. S. 398, 28 Supm. 133 (1907). See also *Stewart v. Harry*, 3 Bush (Ky.), 438 (1868). So in *Chicago, Milwaukee & St. Paul Ry. Co. v. Solan*, 169 U. S. 133, 18 Supm. 289, 42 L. ed. 688 (1898), affirming *Solan v. Chicago, Milwaukee, etc., Ry. Co.*, 95 Iowa, 260, 63 N. W. 692, 28 L. R. A. 718, 58 Am. St. Rep. 430 (1895), this error was repeated in sustaining, as applicable to a claim for an injury happening within the State, under a contract for transportation within the scope of the commerce clause, a statute providing that no contract, etc., should exempt any corporation engaged in transportation by railway from liability of a carrier which would exist had no contract, etc., been made. On this point, see the following decisions, any of which that are contrary to *Chicago, Milwaukee, etc., Ry. Co. v. Solan* are, of course, to be regarded as overruled: *McDaniel v. Chicago & Northwestern Ry. Co.*, 24 Iowa, 412 (1868); *Hazel v. Chicago, Milwaukee & St. Paul Ry. Co.*, 82 Iowa, 477, 48 N. W. 926 (1891); *Missouri Pacific Ry. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643 (1892); *Missouri Pacific Ry. Co. v. International Marine Ins. Co.*, 84 Tex. 149, 19 S. W. 459 (1892); *Houston & T. C. Ry. Co. v. Williams*, 31 S. W. 556 (Tex. Civ. App. 1895); *Mexican Nat. R. Co. v. Savage*, 41 S. W. 663 (Tex. Civ. App. 1897). The same rule was applied in *Martin v. Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284, 27 Supm. 100, 51 L. ed. 184 (1906), in sustaining application of provision that the action and recovery for personal injury should be such only as would exist if the person injured were an employee.

To the same effect with *Chicago, Milwaukee, etc., Ry. Co. v. Solan*, see *Pittman v. Pacific Express Co.*, 24 Tex. Civ. App. 595, 59 S. W. 949 (1900; see as to law of place of contract); *Mexican Nat. R. Co. v. Ware*, 60 S. W. 343 (Tex. Civ. App. 1900); *Galveston, Harrisburg, etc., Ry. Co. v. Fales*, 23 Tex. Civ. App. 457, 77 S. W. 234 (1903); *Hart v. Chicago & N. W. Ry. Co.*, 69 Iowa, 485, 29 N. W. 597 (1886); *Ohio & Mississippi Ry. Co. v. Tabor*,

ticular act complained of occurring within the territorial limits of the State. But it should require no

98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 34 L. R. A. 685 (1895); *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361 (1897); *St. Joseph & Grand Island R. R. Co. v. Palmer*, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335 (1893). See also *Otis Co. v. Missouri Pacific Ry. Co.*, 112 Mo. 622, 20 S. W. 676 (1882); article in 12 Va. Law Reg. 1 (1906), by J. R. Tucker. So in *Crawford v. Southern Ry. Co.*, 56 S. C. 136, 34 S. E. 80 (1899), as to prohibition against overloading railroad cars, notwithstanding contract for exemption from liability.

Under the same head seem properly classed decisions sustaining, as applicable to transportation within scope of commerce clause, provisions by way of prohibition of agreement for limitation of time in which to institute legal proceedings, or provisions as to agreements with reference to time within which to give notice of claim for damages as a condition precedent to instituting such proceedings. *Armstrong v. Galveston, Harrisburg, etc., Ry. Co.*, 92 Tex. 117, 46 S. W. 33 (1898); *Burgess v. Western Union Tel. Co.*, 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833 (1898), reversing in part *Western Union Tel. Co. v. Burgess*, 43 S. W. 1033 (Tex. Civ. App. 1897); *Gulf, Colorado & Santa Fe Ry. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161 (1894); *Reeves v. Texas & Pacific Ry. Co.*, 11 Tex. Civ. App. 514, 32 S. W. 920 (1895); *Galveston, H. & S. A. Ry. Co. v. Johnson*, 29 S. W. 428 (Tex. Civ. App. 1895); *Galveston, H. & S. A. Ry. Co. v. Herring*, 36 S. W. 129 (Tex. Civ. App. 1896); *Missouri, Kansas & Texas Ry. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073 (1897); *Southern Kansas Ry. Co. v. Burgess Co.*, 99 S. W. 189 (Tex. Civ. App. 1905). See also *Houston & Texas Central Ry. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308 (1895).

In *Charles v. Atlantic Coast Line R. Co.*, 58 S. E. 927 (Supm. Ct. S. C., 1907), was sustained, as applicable to such transportation, imposition of liability for failure to adjust and pay claim for loss or damage within time specified. See *Porter v. Charleston & Savannah Ry. Co.*, 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670 (1902). To like effect under like provision, *Morris-Scarboro-Moffitt Co. v. Southern Express Co.*, 59 S. E. 667 (Supm. Ct. N. C., 1907).

Chicago, Milwaukee, etc., Ry. Co. v. Solan was applied in *Richmond & Alleghany R. R. Co. v. R. A. Patterson Tobacco Co.*,

argument that the circumstance of a given act being within such limits is insufficient to bring it within the

169 U. S. 311, 18 Supm. 335, 42 L. ed. 759 (1898), affirming 92 Va. 670, 24 S. E. 261, 41 L. R. A. 511 (1896), in giving effect to a provision as to the obligation assumed by a carrier accepting for transportation anything directed to a point of destination beyond the terminus of his own line. And *Richmond & Alleghany R. R. Co. v. R. A. Patterson Tobacco Co.* was in turn applied in *Missouri, Kansas & Texas Ry. Co. v. McCann*, 174 U. S. 580, 19 Supm. 755, 43 L. ed. 1093 (1899), affirming *McCann v. Eddy*, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110 (1896), in giving effect to a statute imposing liability for the negligence of a connecting carrier, even as to an injury happening outside the State. Here, however, the statute, as construed by the State court, did not prevent the carrier from limiting its liability to its own line. See article in 11 Va. Law Reg. 791 (1906), by A. W. Patterson. See *Western Sash & Door Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 177 Mo. 641, 76 S. W. 998 (1903), disapproving *Dimmitt v. Kansas City, St. Joseph, etc., R. R. Co.*, 103 Mo. 433, 15 S. W. 761 (1890), as to conditions of exemption from liability under such statute. In *Kavanaugh v. Southern Ry. Co.*, 120 Ga. 62, 47 S. E. 526 (1904), was sustained, as applicable to such transportation, a provision for determination of liability as among carriers in case of carriage over connecting roads, though the liability thus imposed was held waived.

See also as to liability of carrier beyond terminus of its own line *Central of Georgia Ry. Co. v. Kavanaugh*, 92 Fed. 56, 34 C. C. A. 203 (5th C. 1899).

In *Central of Georgia Ry. Co. v. Murphey*, 196 U. S. 194, 25 Supm. 218, 49 L. ed. 444 (1905), reversing 116 Ga. 863, 43 S. E. 265, 60 L. R. A. 817 (1903), was held invalid, as applied to such transportation, a provision imposing, in case of transportation by two or more carriers, certain duties upon the initial or a connecting carrier as to the tracing of freight and furnishing certain information. But this was because of the "onerous" character of the duties imposed, being regarded as "a direct and immediate burden upon" interstate commerce as distinguished from "a reasonable regulation in aid" thereof. But in *Skipper v. Seaboard Air Line Ry.*, 75 S. C. 276, 55 S. E. 454, 7 L. R. A. N. S. 388 (1906), the imposition of liability upon an initial carrier under similar provisions was sustained, it being pointed out, however, that, while under the provision under consideration in *Central of Georgia Ry. Co. v. Murphey* the initial carrier was absolutely

power of the State to regulate, provided it be a mere incident of transportation within the scope of the commerce clause. This has already been abundantly illustrated.^{97a} It is of course to be understood that what is here said has no application to regulation of liability for loss or injury to a member of the general public not enjoying the benefit of transportation within the scope of the commerce clause, thus, as to injury to adjoining real estate caused by fire from a locomotive engine.⁹⁸ Whether it also applies to regu-

liable upon failure to furnish the desired information within the time prescribed, in the case at bar it was excused from liability upon proof that by the exercise of due diligence it had been unable to trace the line on which the loss or damage occurred, it being also provided that it might discharge itself from liability by the production of a receipt from the connecting carrier; also that the bill of lading, etc., issued for freight, etc., should be *prima facie* evidence of liability for loss or damage. To similar effect, *Jonesville Manuf. Co. v. Southern Ry.*, 58 S. E. 422 (Supm. Ct. S. C., 1907). But in *Venning v. Atlantic Coast Line R. Co.*, 58 S. E. 983 (Supm. Ct. S. C., 1907), was applied *Central of Georgia Ry. Co. v. Murphey* in holding invalid broad imposition of liability for loss or damage occurring on connecting line.

In *Central of Georgia Ry. Co. v. Murphey*, *supra*, it was regarded as unnecessary to decide as applicable to such transportation the validity of a prohibition of a contract limiting the liability of a carrier to injury occurring on its own line.

As to injuries upon the high seas, see *The E. B. Ward*, 16 Fed. 255 (C. C. La., 1883); in waters adjacent to coast, *Humboldt Lumber Manuf. Assoc. v. Christopherson*, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264 (9th C. 1896), affirming 60 Fed. 428 (D. C. Cal., 1894).

^{97a} See § 24.

⁹⁸ A provision for liability in such case was sustained in *Smith v. Boston & Maine R. R.*, 63 N. H. 25 (1884). See also *McCandless v. Richmond, etc., R. R. Co.*, 38 S. C. 103, 116, 16 S. E. 429, 433, 18 L. R. A. 440, 445 (1892); followed in *Mobile Ins. Co. v. Columbia, etc., R. R. Co.*, 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725 (1894). See also *Lipfeld v. Charlotte, etc., R. R. Co.*, 41 S. C. 285, 19 S. E. 497 (1894).

lation of liability for loss or injury to an employee of one engaged in such transportation seems more doubtful.⁹⁹

§ 106. The same; for failure of duty to transport.

Closely associated with regulation of liability for loss or injury in the course of transportation is regulation of liability for failure to perform the duty to transport, thus, failure to deliver at the place of destination an article or a telegraphic message.¹ For the reasons already stated, it seems, or should seem, clear that it is beyond the power of the State to regulate liability on account of such failure. There has been an attempt to distinguish in this respect transportation to a point *within*, from transportation to a point *without*, the State, and it seems judicially established that the power exists in the former,² but not in

⁹⁹ Such regulation was sustained in *Peirce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705 (6th C. 1897). See § 39.

¹ As to liability for failure to transmit telegram between points in State over route partly outside, see § 27.

² Thus, as to a despatch from a point without to one within the State, in *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Supm. 934, 40 L. ed. 1105 (1896), affirming 90 Ga. 254, 16 S. E. 83 (1892), was sustained a provision for the imposition of liability for failure to transmit and deliver with due diligence. The decision below in 90 Ga. 254 had been followed in *Western Union Tel. Co. v. Bates*, 93 Ga. 352, 20 S. E. 639 (1893); *Western Union Tel. Co. v. Howell*, 95 Ga. 194, 22 S. E. 286, 30 L. R. A. 158, 51 Am. St. Rep. 68 (1894); *Western Union Tel. Co. v. Lark*, 95 Ga. 806, 23 S. E. 118 (1895). To like effect, *Telegraph Co. v. Mellon*, 100 Tenn. 429, 45 S. W. 443 (1898); *Western Union Tel. Co. v. Tyler*, 90 Va. 297, 18 S. E. 280, 44 Am. St. Rep. 910 (1893); *Western Union Tel. Co. v. Bright*, 90 Va. 778, 20 S. E. 146 (1894). So in *Butner v. Western Union Tel. Co.*, 2 Okla. 234, 247, 37 Pac. 1087, 1091 (1894), of provision as to order in which despatches should be received and transmitted. See *Western Union Tel. Co. v. Fenton*, 52 Ind. 1 (1875); *Reed v. Western*

the latter, case.³ The distinction seems to us to be utterly unsubstantial. In either case it is transporta-

Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609 (1896); *Western Union Tel. Co. v. Reynolds*, 100 Va. 459, 41 S. E. 856, 93 Am. St. Rep. 971 (1902); *Western Union Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528 (1906).

In *Western Union Tel. Co. v. James* it was regarded as unnecessary to decide the validity of such a provision "if the penalty provided were so grossly excessive that the necessary operation of such legislation would be to impede interstate commerce."

So, as to transportation into the State, in *U. S. Express Co. v. State*, 164 Ind. 196, 73 N. E. 101 (1905), was sustained a requirement of delivery of express matter in cities of a certain population.

So of imposition of liability for failure to deliver on payment of charges. *Little Rock & Fort Smith Ry. Co. v. Hanniford*, 49 Ark. 291, 5 S. W. 294 (1887). But such a provision is inapplicable in view of section 6 of the Interstate Commerce Act relating to the same subject-matter. *Gulf, Colorado & Santa Fe Ry. Co. v. Hefley*, 158 U. S. 98, 15 Supm. 802, 39 L. ed. 910 (1895); *St. Louis S. W. Ry. Co. of Texas v. Carden*, 34 S. W. 145 (Tex. Civ. App. 1896); *Houston, East & West Texas Ry. v. Peters*, 15 Tex. Civ. App. 515, 40 S. W. 429 (1897); *Spratlin v. St. Louis Southwestern Ry. Co.*, 76 Ark. 82, 88 S. W. 836 (1905). To the contrary, *Gulf, Colorado & Santa Fe Ry. Co. v. Nelson*, 4 Tex. Civ. App. 345, 23 S. W. 732 (1893); *Gulf, C. & S. F. Ry. Co. v. McCown*, 25 S. W. 435 (Tex. Civ. App. 1894); *Gulf, Colorado & Santa Fe Ry. Co. v. Dwyer*, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926 (1890); *Fort Worth & D. C. Ry. Co. v. Lillard*, 4 Tex. App. Civ. Cas. 123 (1890).

So, as to transportation into the State, was sustained in *Arkansas Southern Ry. Co. v. German National Bank*, 77 Ark. 482, 92 S. W. 522, 113 Am. St. Rep. 160 (1906), provision enforcing duty to deliver to legal holder of bill of lading.

³ Thus, as to a despatch from a point within to a point without the State, in *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Supm. 1126, 30 L. ed. 1187 (1887), reversing 95 Ind. 12, 48 Am. Rep. 692 (1884), was held invalid a requirement of delivery by a messenger, in case of the person to whom the despatch was addressed residing within a certain distance. This overrules *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181 (1875); *Western Union Tel. Co. v. Meredith*, 95 Ind. 93

tion within the scope of the commerce clause that is involved.

§ 107. Pilotage.

It has long been established to be within the power of the States, in the absence of conflicting legislation by Congress, to establish regulations as to pilotage, commonly known as pilotage laws, even as applicable to vessels engaged in transportation within the scope of the commerce clause.⁴ There is here included “ the

(1884); *Western Union Tel. Co. v. Ferris*, 103 Ind. 91, 2 N. E. 240 (1885). And see *Western Union Tel. Co. v. Carter*, 156 Ind. 531, 60 N. E. 305 (1901). See also *Reed v. Western Union Tel. Co.*, 56 Mo. App. 168 (1894); *Connell v. Western Union Tel. Co.*, 108 Mo. 459, 18 S. W. 883 (1891).

In *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363 (1890), *Western Union Tel. Co. v. Pendleton* was, in sustaining liability for damages under like conditions, distinguished on the seemingly insufficient ground that the latter was an action to recover a penalty.

But in *Western Union Tel. Co. v. Michelson*, 94 Ga. 436, 21 S. E. 169 (1894); *Postal Tel. Cable Co. v. Umstadter*, 103 Va. 742, 50 S. E. 259 (1905), was sustained the imposition of liability for failure to transmit despatch from a point within to a point without the State. See *Western Union Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828 (1897); *Arkansas & L. Ry. Co. v. Lee*, 96 S. W. 148 (Supm. Ct. Ark., 1906).

⁴ Such regulations were sustained in *Olsen v. Smith*, 195 U. S. 332, 25 Supm. 52, 49 L. ed. 224 (1904), affirming 68 S. W. 320 (Tex. Civ. App. 1902). To like effect, *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996 (Dec. T. 1851); *Ex parte McNeil*, 13 Wall. 236, 20 L. ed. 624 (Dec. 1871); *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234 (Oct. 1880); *The America*, 1 Low. 176, 1 Fed. Cas. No. 289 (1867); *The Nevada*, 7 Ben. 386, 18 Fed. Cas. No. 10,130 (1874); *The Chase*, 14 Fed. 854 (D. C. Fla., 1882); *The William Law*, 14 Fed. 792 (D. C. Del., 1882); *Low v. Commissioners of Pilotage*, R. M. Charl. (Ga.) 302, 313 (1830); *Barnaby v. State*, 21 Ind. 450 (1863); *Stilwell v. Raynor*, 1 Daly (N. Y.), 47 (1860); *Cisco v. Roberts*, 36 N. Y. 292 (1867), reversing 6

regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of

Bosw. 494 (1860); *State v. Penny*, 19 S. C. 218 (1883); *State v. Ames*, 92 Pac. 137 (Supm. Ct. Wash., 1907).

So of regulation by Territory. *The Panama*, *infra*.

Held no objection to the application of such regulations that the tender of services was beyond the territorial jurisdiction of the State. *Wilson v. McNamee*, *supra*; *Wilson v. Wills*, 10 Abb. Pr. N. S. (N. Y.) 143 (N. Y. Com. Pl., 1871), overruling *Peter-son v. Walsh*, 1 Daly (N. Y.), 182 (1861). As to application to acts of pilots beyond such jurisdiction, see *Viriden's Appeal*, 13 Phila. (Pa.) 151 (1879).

See also *Gibbons v. Ogden*, 9 Wheat. 1, 207, 6 L. ed. 23 (1824); *Hobart v. Drogan*, 10 Pet. 108, 120, 9 L. ed. 363 (Jan. T. 1836); *County of Mobile v. Kimball*, 102 U. S. 691, 697, 26 L. ed. 238 (Oct. 1880); *Thompson v. Darden*, 198 U. S. 310, 25 Supm. 660, 49 L. ed. 1064 (1905), affirming *Darden v. Thompson*, 101 Va. 635, 44 S. E. 755 (1903); *Chapman v. Miller*, 2 Speers (S. C.) 769 (1844).

In *Cooley v. Port Wardens*, *supra*, such regulations were held not repugnant to the prohibition of art. 1, § 10, against laying imposts or duties on imports or exports, or duties of tonnage; or to that of art. 1, § 9, against giving preference to the ports of one State over those of another. But in *Williams v. The Lizzie Henderson*, 29 Fed. Cas. No. 17,726a (D. C. Fla., 1880), a provision was held invalid, not under the commerce clause, but under art. 1, § 9.

That such regulations have not been superseded by Congressional legislation, see *Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805 (Dec. 1864); *People v. Sperry*, 50 Barb. (N. Y.) 170 (1867); *State v. Leech*, *infra*. On this point seems overruled *The Panama*, Deady, 27, 18 Fed. Cas. No. 10,702 (1861); *Dryden v. Commonwealth*, 16 B. Monr. (Ky.) 598 (1856).

By R. S., § 4235, "until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose." As to this or the like provision of act of 1789, see *Cooley v. Port Wardens*, *supra*; *The Wave v. Hyer*, 2 Paine, 131, 29 Fed. Cas. No. 17,300 (—); *Cribb v. State*, 9

the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced.”⁵ A discussion of

Fla. 409 (1861); *State v. Leech*, *infra*; *People ex rel. Sisco v. Commissioners of Pilots*, 23 Hun (N. Y.), 603 (1881).

As to R. S., § 4236, as to waters the boundary between two States, see *The Clymene*, 12 Fed. 346 (C. C. Pa., 1882), affirming 9 Fed. 164 (D. C. Pa., 1881); *The Alzena*, 14 Fed. 174 (D. C. Pa., 1882); *The Charles A. Sparks*, 16 Fed. 480 (D. C. Pa., 1883); *The Abercorn*, 26 Fed. 877 (D. C. Oreg., 1886); *The Alcalde*, 30 Fed. 133 (D. C. Oreg., 1887); *The South Cambria*, 27 Fed. 525 (D. C. Del., 1886); *The Panama*, *supra*; *Cribb v. State*, *supra*; *Dryden v. Commonwealth*, *supra*; *State v. Leech*, 119 La. Ann. 446, 44 So. 285 (1907); *Hopkins v. Wyckoff*, 1 Daly (N. Y.), 176 (1861); *Neil v. Wilson*, 14 Oreg. 410, 12 Pac. 810 (1887); *Chambers v. The Clymene*, 14 Phila. (Pa.) 603 (1881).

As to prohibition of R. S., § 4237, against discrimination between vessels sailing between the ports of one State and those of different States, see *Sprague v. Thompson*, 118 U. S. 90, 6 Supm. 988, 30 L. ed. 115 (1886), reversing *Thompson v. Sprague*, 69 Ga. 409, 47 Am. Rep. 760 (1883); *Freeman v. The Undaunted*, 37 Fed. 662 (C. C. Cal., 1889); *Williams v. The Lizzie Henderson*, *supra*; *The Alameda*, 31 Fed. 366 (D. C. Cal., 1887); *The Alameda v. Neal*, 32 Fed. 331 (C. C. Cal., 1887).

As to provisions of R. S., § 4401, as to “coastwise sea-going steam vessel” and of § 4444 as to “coastwise steam vessels,” see *Huus v. N. Y. & Porto Rico Steamship Co.*, 182 U. S. 392, 21 Supm. 827, 45 L. ed. 1146 (1901), affirming *Bigley v. N. Y. & P. R. S.S. Co.*, 105 Fed. 74 (D. C. N. Y., 1900); *Murray v. Clark*, 4 Daly (N. Y.), 468 (1873). As to effect of act of February 25, 1867, see *Henderson v. Spofford*, 59 N. Y. 131 (1874); *Commissioners of Pilots v. Pacific Mail S.S. Co.*, 52 N. Y. 609 (1873); *The George S. Wright*, Deady, 591, 10 Fed. Cas. No. 5,340 (1869).

As to jurisdiction of court of admiralty to enforce claim for pilotage under State statute, see *Banta v. McNeil*, 5 Ben. 74, 2 Fed. Cas. No. 966 (1871); *Weaver v. McLellan*, 5 Ben. 79, 29 Fed. Cas. No. 17,309 (1871). Compare *The Alaska*, 3 Ben. 391, 1 Fed. Cas. No. 129 (1869).

⁵ *Cooley v. Port Wardens*, *supra*. Here was sustained the imposition of liability for half pilotage upon a vessel refusing to take a pilot.

whether such regulation is not beyond the power of the States would seem academic. In the view herein taken, however, it seems sustainable only on the supposition that it is exercised for the benefit of either the general public or those enjoying the benefit of transportation wholly within the State, thus, for the purpose of securing safety and convenience of navigation by vessels engaged in such transportation. Otherwise, for reasons already stated, such regulation seems beyond the power of the States. In this view it is not apparent why it should be within the power of the State to, for instance, fix the compensation of a pilot employed on a vessel engaged in transportation within the scope of the commerce clause, any more than it is to fix the compensation of a carrier by railroad for such transportation.

CHAPTER V.

TAXES AND OTHER CHARGES.

- SECTION 108. Power to tax, as depending on presence of property within territorial jurisdiction.
- 109. Exemption of property in transit or temporarily within jurisdiction.
 - 110. Original package doctrine; distinction between commerce "among the States" and "with foreign nations."
 - 111. Vessels.
 - 112. Property employed in transportation within scope of commerce clause.
 - 113. The same; proportionate valuation.
 - 114. Property acquired (*e. g.*, earnings or receipts) in course of transportation within scope of commerce clause.
 - 115. The same; "intangible property."
 - 116. Charge for special facilities; *e. g.*, for wharfage; charge for governmental supervision.

§ 108. Power to tax, as depending on presence of property within territorial jurisdiction.

It has already been seen that restrictions invalidly imposed, under the authority of a State, upon transportation within the scope of the commerce clause have commonly been by way of requirement of payment of a tax, commonly termed a "license" or "privilege" tax. And it has been stated that such a tax is to be carefully distinguished from a mere tax not imposed as a condition of engaging in transportation within the scope of the commerce clause.¹ But this distinction has not infrequently been overlooked, and considerable confusion has resulted. Leaving out of consideration such a "license" or "privilege" tax, the commerce clause has little or no legitimate application to the case of ordinary taxation under the authority of a State, whether of personal or real

¹ See § 70.

property. Instead of an inquiry whether in a given case such taxation is in conflict with the commerce clause, the inquiry should, ordinarily at least, be whether the property sought to be taxed is "*within the territorial jurisdiction of the taxing power*,"² and, this inquiry answered, there will be little or no occasion for the further inquiry as to the application of the commerce clause. It will be seen, however, that there is a strong tendency to thus unnecessarily inquire as to the application of the commerce clause,³

² *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 Supm. 36, 50 L. ed. 150 (1905). See also *Fargo v. Hart*, 193 U. S. 490, 24 Supm. 498, 48 L. ed. 761 (1904); also article in 7 *Columbia Law Rev.* 309 (1907), by J. B. Moore.

³ A notable instance of such tendency is furnished by *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Supm. 826, 29 L. ed. 158 (1885), reversing *Commonwealth v. Gloucester Ferry Co.*, 98 Pa. St. 105 (1881), a tax being here held unlawfully imposed upon the capital stock of a foreign corporation exclusively engaged in transportation within the scope of the commerce clause, that is, ferrying passengers and freight. It owned no other property in the State than the lease of a slip or dock at which such passengers and freight were received and landed, nor were the boats that were used for transportation (and registered at a port outside the State) allowed to remain in the State except so long as necessary to discharge and receive passengers and freight. See also *Central R. R. Co. v. State Board of Assessors*, 49 N. J. Law, 1, 20, 7 Atl. 306, 315 (1886). The true ground of this decision seems to have been that *the greater part of the property taxed was outside the jurisdiction of the State*. In this view the commerce clause, though extensively discussed in the opinion, had no bearing in the matter. Indeed we are unable to see that it had any bearing whatever save on the supposition that the tax was imposed *as a condition of engaging in interstate transportation*, but, so far at least as appears from the report, such was not the case. It will not of course be contended that there is anything necessarily illegal in imposing a tax upon the capital stock of a corporation (whether foreign or domestic) engaged in transportation within the scope of the commerce clause. See § 112.

Another notable instance of such tendency to give illegitimate

a tendency that is, in our view, strongly to be deprecated, as tending to increase the already abundant confusion as to its proper scope.

§ 109. Exemption of property in transit or temporarily within jurisdiction.

It seems established, apart from the effect of the commerce clause, that it is beyond the authority of a State to tax property, at any rate, of a nonresident, that is merely in transit, or within the jurisdiction for a temporary purpose only, without having acquired a *situs* in the State.⁴ To the extent that this rule application to the commerce clause is seen in the decisions relating to the exemption of property in course of commercial transportation. See § 109.

⁴ See *Hays v. Pacific Mail Steamship Co.*, 17 How. 596, 15 L. ed. 254 (Dec. T. 1854); *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303 (Dec. 1872); *Blackstone v. Miller*, 188 U. S. 189, 23 Supm. 277, 47 L. ed. 439 (1903); *People ex rel. Burke v. Wells*, 184 N. Y. 275, 77 N. E. 19 (1906); *Cooley on Taxation* (3d ed.), p. 89; *Wharton on Conflict of Laws* (3d ed.), § 80b.

Property in transit to market outside of State, but delayed merely for separation and assortment for convenience of shipment, held exempt in *State v. Engle*, 34 N. J. Law, 425 (1871). To similar effect, *State v. Carrigan*, 39 N. J. Law, 35 (1876); *Berwind & White Coal Co. v. Mayor, etc., of Jersey City*, 67 Atl. 181 (Supm. Ct. N. J., 1907).

For other instances of property in transit held exempt, see *Connecticut River Lumber Co. v. Columbia*, 62 N. H. 286 (1882); *Conley v. Chedic*, 7 Nev. 336 (1872); *State v. Union Tank Line Co.*, 94 Minn. 320, 102 N. W. 721 (1905); *Matter of Union Tank Line*, 204 Ill. 347, 68 N. E. 504, 98 Am. St. Rep. 221 (1903); *Delaware & Hudson Canal Co. v. Commonwealth*, 1 Monag. (Pa.) 36, 17 Atl. 175, 1 L. R. A. 232 (1888).

As to *situs* of railroad rolling stock, see *People ex rel. N. Y. Central, etc., R. R. Co. v. Miller*, 202 U. S. 584, 26 Supm. 714, 50 L. ed. 1155 (1906); *Carlisle v. Pullman Palace Car Co.*, 8 Colo. 320, 7 Pac. 164, 54 Am. Rep. 553 (1885); *Denver & Rio Grande Ry. Co. v. Church*, 17 Colo. 1, 28 Pac. 468, 31 Am. St. Rep. 252 (1891); *City of Dubuque v. Illinois Central R. R. Co.*, 39 Iowa,

plies, it seems entirely unnecessary to resort to the commerce clause to determine the validity of taxation of such property. But the want of authority to tax property in course of transportation within the scope of the commerce clause, whether into or out of the State, is commonly based on the commerce clause.⁵ In case of transportation into (or through) the State, the exemption continues only until the property arrives at its final destination, this rule being commonly

56, 76 (1874); *Philadelphia, Wilmington & Baltimore R. R. Co. v. Appeal Tax Court*, 50 Md. 397 (1879); *Appeal Tax Court v. Pullman Palace Car Co.*, 50 Md. 452 (1879); *Bain v. Richmond & Danville R. R. Co.*, 105 N. C. 363, 11 S. E. 311, 8 L. R. A. 299, 18 Am. St. Rep. 912 (1890); *Pacific R. R. Co. v. Cass County*, 53 Mo. 17 (1873).

Property in State for purpose of undergoing part of process of manufacture held to have *situs* therein for purposes of taxation. *Standard Oil Co. v. Combs*, 96 Ind. 179, 49 Am. Rep. 156 (1884). See *Powell v. City of Madison*, 21 Ind. 335 (1863); *Rieman v. Shepard*, 27 Ind. 288 (1866).

⁵ Thus in *Kelley v. Rhoades*, 188 U. S. 1, 23 Supm. 259, 47 L. ed. 359 (1903), reversing 9 Wyom. 352, 63 Pac. 935, 87 Am. St. Rep. 959 (1901) (see previous decision in 7 Wyom. 237, 51 Pac. 593, 39 L. R. A. 594, 75 Am. St. Rep. 904 [1898]), was held invalidly imposed a tax upon a flock of sheep being driven through the State for the purpose of shipment, traveling as rapidly as a due regard for their condition permitted, though incidentally supporting themselves by grazing while in transit. So held, though, for the purpose of shipment, it was not necessary that the sheep be driven into the State, and though the railroad over which they were shipped could be reached from the point where they were first driven by traveling a less distance than was necessary to travel from the place where they were first driven to any point in the State. No reliance was placed on the fact that the sheep had been duly returned for taxation and assessed for the taxes of the same year in another jurisdiction, "although this may have some bearing upon the equities of the case." The decisions below had been followed in *Carton v. Commissioners of Uinta County*, 10 Wyom. 416, 69 Pac. 1013 (1902). See also *Waggoner v. Whaley*, 21 Tex. Civ. App. 1, 50 S. W. 153 (1899).

applied to property awaiting a sale at the place of destination.⁶ In case of transportation *out of* the State, the mere intention that it shall be transported is obviously insufficient to create such exemption, and the effect of acts done with a view to such transportation depends on circumstances. The point of time when such exemption commences to exist, that is, when the property "ceases to be governed exclusively by the domestic law and begins to be governed and protected by the national law of commercial regulation," is that at which it "commences its *final* movement for transportation" out of the State.⁷ But if prop-

⁶ Thus in *Brown v. Houston*, 114 U. S. 622, 628, 5 Supm. 1091, 1094, 29 L. ed. 257 (1885), affirming 33 La. Ann. 843, 39 Am. Rep. 284 (1881), was sustained a tax upon coal that had just arrived in the State by boats, being still on such boats and held for sale, it being said (114 U. S. 632, 5 Supm. 1096); "The coal had come to its place of rest, for final disposal or use and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the State."

Brown v. Houston was applied under like conditions in *Pittsburg & Southern Coal Co. v. Bates*, 156 U. S. 577, 15 Supm. 415, 39 L. ed. 538 (1895), affirming 40 La. Ann. 226, 3 So. 642, 8 Am. St. Rep. 519 (1888). So in *Myers v. County Commrs. of Baltimore County*, 83 Md. 385, 35 Atl. 144, 34 L. R. A. 309, 55 Am. St. Rep. 349 (1896), in sustaining tax upon cattle that had been transported into the State and there kept until it was determined what disposition should be made of them. So held though they were purchased with the intention to export them. See also *McConn v. Roberts*, 25 Iowa, 152 (1868).

For other applications of the general rule, see *Singer Manuf. Co. v. Wright*, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497 (1894); *Burlington Lumber Co. v. Willetts*, 118 Ill. 559, 9 N. E. 254 (1886); *Darnell v. City of Memphis*, 116 Tenn. 424, 95 S. W. 816 (1906); *Lehigh & Wilkesbarre Coal Co. v. Borough of Junction*, 66 Atl. 923 (Supm. Ct. N. J., 1907). As to application of original package doctrine, see § 110.

⁷ Thus in *Coe v. Errol*, 116 U. S. 517, 6 Supm. 475, 29 L. ed. 715 (1886), affirming 62 N. H. 303 (1882), the tax was sustained

erty in course of such transportation "be stored for an indefinite time during such transit, at least for other than natural causes, or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities,"⁸ thus, doubtless, in case of property awaiting a sale "at an intermediate point."⁹

§ 110. Original package doctrine; distinction between commerce "among the States" and "with foreign nations."

It has been seen that, according to the "original package doctrine," transportation of property within

upon logs cut and drawn to the place from which they were to be transported to another State, there to remain until it should be convenient to send them to their destination, but which had not been shipped or started on their final voyage. To similar effect, *Carrier v. Gordon*, 21 Ohio St. 605 (1871); *C. N. Nelson Lumber Co. v. Town of Loraine*, 22 Fed. 54 (C. C. Wis., 1884); *State v. Taber Lumber Co.*, 112 N. W. 214 (Supm. Ct. Minn., 1907). See also *John Hancock Ice Co. v. Rose*, 67 N. J. Law, 86, 50 Atl. 364 (1901); *Ayer & Lord Tie Co. v. Keown*, 93 S. W. 588 (Ct. App. Ky., 1906). So in *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Supm. 266, 47 L. ed. 394 (1903), upon logs cut and put into a river for the purpose of preservation. Though intended to be floated down the river to be transported into another State for the purpose of manufacture, it was also intended that only a comparatively small proportion should be so transported in any one season. In *Rothermel v. Meyerle*, 136 Pa. St. 250, 20 Atl. 583, 9 L. R. A. 366 (1890), by the same rule was sustained the requirement of a license fee for buying, etc., articles "with intent to send the same for sale or barter to any other market," this being assumed to apply to so sending out of the State.

But in *Ogilvie v. Crawford County*, 7 Fed. 745 (C. C. Iowa, 1881), there was held not subject to taxation corn in cribs awaiting transportation by railroad out of the State, and which was thereafter so transported. So in *Standard Oil Co. v. Bachelor*, 89 Ind. 1 (1883), of staves in piles.

As to tax on legacy payable to nonresident, see *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168 (Jan. T. 1850).

⁸ *Kelley v. Rhoads*, *supra*.

⁹ *Kelley v. Rhoads*, *supra*.

the scope of the commerce clause continues even after arrival at its final destination, that is, until sale in the original package, or breaking thereof.¹⁰ And it has just been seen to be the general rule that it is beyond the authority of a State to tax property in course of transportation within the scope of the commerce clause. It seems to clearly follow that in case of transportation in an original package it is beyond the authority of the State to tax until sale in the original package or breaking thereof. But by a singular course of reasoning, the soundness of which is not apparent, it is established to the contrary, that in case of transportation into a State, it is within the authority of the State to tax after arrival at the final destination, though before sale in the original package or breaking thereof.¹¹ It seems clear enough that, so far

¹⁰ See § 17.

¹¹ *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Supm. 365, 48 L. ed. 538 (1904), affirming 110 Tenn. 524, 75 S. W. 1037, 100 Am. St. Rep. 814 (1903). Here was sustained a tax upon goods held in store to be sold and delivered as contracts for that purpose were completely consummated, a distinction being thought to exist between such cases and those of absolute prohibition such as were under consideration in, for instance, *Brown v. Maryland*, *infra*; *Leisy v. Hardin*, 135 U. S. 100, 10 Supm. 681, 34 L. ed. 128 (1890). See *Swift v. U. S.*, 196 U. S. 375, 399, 25 Supm. 276, 280, 49 L. ed. 518 (1905); *Oliver Finney Grocery Co. v. Speed*, 87 Fed. 408 (C. C. Tenn., 1898). *American Steel & Wire Co. v. Speed* was applied under like conditions in *Merchants' Transfer Co. v. Board of Review of Des Moines*, 128 Iowa, 732, 105 N. W. 211, 2 L. R. A. N. S. 662 (1905).

A fortiori, may the tax be sustained if the contents of the package have been distributed. *May v. New Orleans*, 178 U. S. 496, 20 Supm. 976, 44 L. ed. 1165 (1900), affirming 51 La. Ann. 1064, 25 So. 959 (1899); *Parks v. Nez Perce County*, 89 Pac. 949 (Supm. Ct. Idaho, 1907). So upon the proceeds of the sales of goods imported in such packages, *New York ex rel. Burke v.*

as the commerce clause merely is concerned, the same is true of transportation from a foreign country. But as to such case, it seems established that it is beyond the authority of the State to tax until sale in the original package or breaking thereof.¹² This results from

Wells, 28 Supm. 193 (1908), affirming 184 N. Y. 275, 77 N. E. 19 (1900), 107 App. Div. 15, 95 N. Y. Suppl. 100 (1905).

In *American Steel & Wire Co. v. Speed* was applied *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382 (Dec. 1868), affirming 41 Ala. 334 (1867), where was sustained a tax on auction sales, as applied to sales in the original package. To like effect seem *People v. Coleman*, 4 Cal. 46, 56, 60 Am. Dec. 581, 589 (1854); *Harri-son v. Mayor, etc., of Vicksburg*, 11 Miss. 581, 41 Am. Dec. 633 (1844); *State v. Pinckney*, 10 Rich. Law (S. C.), 474 (1857).

Woodruff v. Parham seems to overrule *State v. Kennedy*, 19 La. Ann. 397 (1867).

¹² *Low v. Austin*, 13 Wall. 29, 20 L. ed. 517 (Dec. 1871), where it was held to make no difference that the tax was not directly upon imports as such, but upon such goods included as part of the whole property of the citizens of the State subjected equally to an *ad valorem* tax. In *Low v. Austin* was applied *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678 (1827), a case, however, of requirement of a license to be taken out by an importer before being authorized to sell. See *Biddle v. Commonwealth*, 13 Serg. & R. (Pa.) 405 (1825). In *Brown v. Maryland*, however, such requirement was regarded as also in contravention of the commerce clause.

Low v. Austin was followed in holding invalid the imposition of such a tax in *Gerdan v. Davis*, 67 N. J. Law, 88, 50 Atl. 586 (1901); *People ex rel. Bijur v. Barker*, 155 N. Y. 330, 49 N. E. 940 (1898), affirming 21 App. Div. 480, 48 N. Y. Suppl. 641 (1897); *State ex rel. Gelpi v. Board of Assessors*, 46 La. Ann. 145, 15 So. 10, 49 Am. St. Rep. 318 (1894); *Re Pitkin*, 193 Ill. 268, 61 N. E. 1048 (1901); *Re Doane*, 197 Ill. 376, 64 N. E. 377 (1902). See also *Siegfried v. Raymond*, 190 Ill. 424, 60 N. E. 868 (1901). To like effect, *People v. Moring*, 3 Abb. App. Dec. (N. Y.) 539 (1867).

On this point seem overruled *Raguet v. Wade*, 4 Ohio, 107 (1829). And see *Padelford v. Mayor, etc., of Savannah*, 14 Ga. 438 (1854). So in *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015 (Oct. 1878), was held invalid imposition of tax on sales by auction as applied to sales in the original package; in *Gelpi v. Schenck*, 48 La. Ann. 1535, 21 So. 115 (1896), on uncollected price of goods imported in such packages.

the application to commerce with foreign countries, of the distinct constitutional provision (which does not apply to commerce "among the States"¹³) that "no State shall, without the consent of Congress, lay any impost or duty on *imports* or exports."¹⁴ As already stated the cases of taxation here under consideration are to be carefully distinguished from a tax imposed *as a condition of engaging in transportation within the scope of the commerce clause*.¹⁵

¹³ *Woodruff v. Parham*, *supra*; *Brown v. Houston*, 114 U. S. 622, 628, 5 Supm. 1091, 1094, 29 L. ed. 257 (1885); *Pittsburg & Southern Coal Co. v. Louisiana*, 156 U. S. 590, 15 Supm. 459, 39 L. ed. 544 (1895); *New Mexico ex rel. McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 27 Supm. 1, 51 L. ed. 78 (1906); *Preston v. Finley*, 72 Fed. 850 (C. C. Tex., 1896); *Rothermel v. Meyerle*, 136 Pa. St. 250, 20 Atl. 583, 9 L. R. A. 366 (1890). See *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. 609, 11 L. R. A. 179 (C. C. N. C., 1890).

As to unnecessary intimation to the contrary in *Brown v. Maryland*, see *Woodruff v. Parham*, *supra*. See also *License Cases*, 5 How. 504, 594, 599, 622, 12 L. ed. 256 (Jan. T. 1847). Such provision was, indeed, in *Almy v. State of California*, 24 How. 169, 16 L. ed. 644 (Dec. T. 1860), applied to transportation among States, but this seems to have been an oversight. See *Woodruff v. Parham*, *supra*.

As to effect of provision as to exports, see *Turpin v. Burgess*, 117 U. S. 504, 6 Supm. 835, 29 L. ed. 988 (1886); *Cornell v. Coyne*, 192 U. S. 418, 24 Supm. 383, 48 L. ed. 504 (1904); *People ex rel. Haneman v. Tax Commissioners*, 10 Hun, 255 (1877), affirmed in 73 N. Y. 607 (1878). As to application to transmission of property to beneficiary under will, see *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168 (Jan. T. 1850).

¹⁴ Art. 1, § 10.

¹⁵ Such distinction seems to have been overlooked in *Standard Oil Co. v. City of Fredericksburg*, 105 Va. 82, 52 S. E. 817 (1906); *Re May*, 82 Fed. 422 (C. C. Mont., 1897), in sustaining a *license tax* on account of the sale of property transported into the State. See also *Ex parte Brown*, 48 Fed. 435 (D. C. N. C., 1891); *Meyer v. City of Mobile*, 147 Fed. 843 (C. C. Ala., 1906).

§ 111. Vessels.

Although under certain conditions a vessel engaged in transportation within the scope of the commerce clause may doubtless be taxed at the "domicile of the owner"¹⁶ as its proper *situs*, for the purpose of taxation, it is certain that for such purpose it may acquire a *situs* elsewhere than at such domicile.¹⁷ It seems

¹⁶ So stated in *Ayer & Lord Tie Co. v. Kentucky*, *infra*. But see *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 Supm. 36, 50 L. ed. 150 (1905). So held as to unregistered vessel in *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386, 15 Atl. 443, 1 L. R. A. 237, 9 Am. St. Rep. 116 (1888). See *Perry v. Torrence*, 8 Ohio, 521, 32 Am. Dec. 725 (1838; *Gunther v. Mayor, etc., of Baltimore*, 55 Md. 457 (1881); *California Shipping Co. v. City of San Francisco*, 88 Pac. 704 (Supm. Ct. Cal., 1907).

¹⁷ Thus, in *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, 25 Supm. 686, 49 L. ed. 1059 (1905), affirming 102 Va. 576, 46 S. E. 783, 102 Am. St. Rep. 855 (1904), as to vessels employed wholly within the limits of a given State. So in *McRae v. Bowers Dredging Co.*, 90 Fed. 360 (C. C. Wash., 1898), of dredges. So in *National Dredging Co. v. State*, 99 Ala. 462, 12 So. 720 (Nov. T. 1892), of dredges, towboats and scows. But, no such *situs* having been acquired, the "home port" (see U. S. R. S., § 4141) was held to be the *situs* for taxation, notwithstanding temporary registration elsewhere, in *Olson v. City, etc., of San Francisco*, 148 Cal. 80, 82 Pac. 850, 2 L. R. A. N. S. 197, 113 Am. St. Rep. 191 (1905). See also *Yost v. Lake Erie Transp. Co.*, *infra*; *Irwin v. New Orleans, St. Louis & Chicago R. R. Co.*, 94 Ill. 105, 34 Am. Rep. 208 (1879); *City of Newport v. Berry*, 19 S. W. 238 (Ct. App. Ky. 1892).

Vessels were held not to have acquired a *situs* in a given State for purposes of taxation, in *Hays v. Pacific Mail Steamship Co.*, 17 How. 596, 15 L. ed. 254 (Dec. T. 1854); *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303 (Dec. 1872); *Yost v. Lake Erie Transp. Co.*, 112 Fed. 746, 50 C. C. A. 511 (6th C. 1901). See *Johnson v. De Bary-Baya Merchants' Line*, 37 Fla. 499, 19 So. 640, 37 L. R. A. 518 (1896); *Graham v. Township of St. Joseph*, 67 Mich. 652, 35 N. W. 808 (1888); *People ex rel. Pacific Mail S.S. Co. v. Commissioners of Taxes*, 58 N. Y. 242 (1874); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Supm. 876, 35 L. ed. 613 (1891), affirming 107 Pa. St. 156 (1884); *People v. Niles*, 35 Cal. 282 (1868).

clear also that "enrollment is irrelevant to the question of taxation" of such vessels, the authority to tax depending upon either the domicile of the owner or such *situs* elsewhere acquired.¹⁸

§ 112. Property employed in transportation within scope of commerce clause.

If otherwise property is subject to taxation under the authority of a State, it is no objection to taxation thereof that it is employed in transportation within the scope of the commerce clause.¹⁹ This is, however,

¹⁸ Thus, in *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409, 26 Supm. 679, 50 L. ed. 1082 (1906), a corporation of one State was held not subject to taxation in another on account of vessels enrolled in the latter for convenience. See previous decisions in *Commonwealth v. Ayer & Lord Tie Co.*, 117 Ky. 161, 77 S. W. 686 (1903), 79 S. W. 290 (Ct. App. Ky., 1904). See as to effect of act of June 26, 1884 (23 Stat. L. 58).

And vessels were held subject to taxation at a *situs* acquired elsewhere than where registered or enrolled, in *Old Dominion Steamship Co. v. Virginia*, *supra*; *Norfolk & Western Ry. Co. v. Board of Public Works*, 97 Va. 23, 32 S. E. 779 (1899); *North Western Lumber Co. v. Chehalis County*, 25 Wash. 95, 64 Pac. 909, 54 L. R. A. 212, 87 Am. St. Rep. 747 (1901); *National Dredging Co. v. State*, *supra*.

See also as to authority to tax enrolled vessel *Transportation Co. v. Wheeling*, 99 U. S. 273, 25 L. ed. 412 (Oct. 1878), affirming *Wheeling, Parkersburg, etc., Transp. Co. v. City of Wheeling*, 9 W. Va. 170, 27 Am. Rep. 552 (1876); *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 2 Supm. 257, 27 L. ed. 419 (1883); *Moran v. New Orleans*, 112 U. S. 69, 5 Supm. 38, 28 L. ed. 653 (1884).

¹⁹ *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Supm. 876, 35 L. ed. 613 (1891), affirming 107 Pa. St. 156 (1884); *Pullman's Palace Car Co. v. Hayward*, 141 U. S. 36, 11 Supm. 883, 35 L. ed. 621 (1891); *Ficklen v. Shelby County Taxing District*, 145 U. S. 1, 12 Supm. 810, 36 L. ed. 601 (1892); *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 212, 14 Supm. 1087, 1090, 38 L. ed. 962 (1894); *Cleveland, Cincinnati, etc., Ry. Co. v. Backus*, 154 U. S. 439, 14 Supm. 1122, 38 L. ed.

to be distinguished from the invalid imposition of a condition by way of tax upon the use of such property in such transportation.²⁰ The distinction between a

1041 (1894); *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 14, 16 Supm. 1054, 1058, 41 L. ed. 49 (1896); *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 220, 17 Supm. 305, 309, 41 L. ed. 683 (1897); *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Supm. 817, 47 L. ed. 995 (1903). There are numerous decisions in the State and lower Federal courts to the same effect.

See also *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303 (Dec. 1872); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 206, 5 Supm. 826, 829, 29 L. ed. 158 (1885); *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Supm. 1380, 32 L. ed. 311 (1888); *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, 218, 17 Supm. 604, 605, 41 L. ed. 965 (1897).

Thus, in *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 622, 19 Supm. 553, 564, 43 L. ed. 823 (1899), was sustained a tax upon the portions within the State of a bridge erected under the authority or with the consent of Congress and used in such transportation. As to effect of declaration by Congress that bridge should be recognized as a post road, see *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Supm. 532, 41 L. ed. 953 (1897). See also *Henderson Bridge Co. v. Henderson City*, 141 U. S. 679, 689, 12 Supm. 114, 118, 35 L. ed. 900 (1891). To similar effect, *Pittsburgh, Cincinnati, Chicago, etc., Ry. Co. v. Board of Public Works of West Virginia*, 172 U. S. 32, 43, 19 Supm. 90, 94, 43 L. ed. 354 (1898).

As to tax on intangible property of corporation using bridge under consideration in *Henderson Bridge Co. v. Henderson City*, see § 115.

To the doctrine stated in the text seems referable *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 2 Supm. 257, 27 L. ed. 419 (1883), affirming 102 Ill. 560 (1882), if such decision be sustainable at all. See § 82. Here was sustained the imposition of a license for ferry-boats plying between States. Compare *St. Louis v. Ferry Co.*, 11 Wall. 423, 20 L. ed. 192 (Dec. 1870).

As to taxation of property of corporation deriving franchise from Congress, see *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Supm. 961, 31 L. ed. 790 (1888); *Western Union Tel. Co. v. Missouri*, 190 U. S. 412, 23 Supm. 730, 47 L. ed. 1116 (1903).

²⁰ See § 70. In *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 15 Supm. 360, 39 L. ed. 311 (1895), affirming 71 Miss. 555, 14 So.

tax thus validly imposed on such property, and the invalid imposition of such condition, may in practice be sometimes difficult to apply, and such application seems ordinarily to largely depend on the amount of the tax.²¹ There seems, however, the less occasion to resort to such distinction in view of a tax on property being subject to the requirement of equality and uniformity under the Fourteenth Amendment. If a given tax on property satisfies this requirement there are probably few instances in which it would be held invalidly imposed as a condition by way of tax upon the use of property in such transportation.

§ 113. The same; proportionate valuation.

Property employed in transportation within the scope of the commerce clause is frequently employed

36, 42 Am. St. Rep. 476 (1893), the tax was sustained as on property, though in form a "privilege tax," the ascertainment of the amount being made dependent in fact on the value of property within the State, and payment not being made a condition precedent to the right to carry on business therein. See *Singer Manuf. Co. v. Wright*, 33 Fed. 121 (C. C. Ga., 1887).

Compare *Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 992 (Jan. T. 1850), affirming *State v. Nathan*, 12 Rob. (La.) 332 (1845), sustaining tax on money or exchange brokers, as applied to one whose sole business was buying and selling foreign bills of exchange.

²¹ In *Commonwealth v. Smith*, 92 Ky. 38, 17 S. W. 187, 36 Am. St. Rep. 578 (1891), was held invalidly imposed as on occupation or business, without regard to value of property owned within the State, a tax upon a telegraph company, transacting an interstate as well as intrastate business, equal to \$1 a mile for the line of poles and first wire, and fifty cents a mile for each additional wire. So in *Postal Tel. Cable Co. v. City of Richmond*, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 877 (1901), of a license tax upon such a company, unless imposed in lieu of all other taxes, and not more than the sum which the company would have had to pay if its property had been subjected to the ordinary *ad valorem* tax. Here the license tax was \$200 and the *ad valorem* tax would have been only \$40. Here was overruled *Western Union Tel. Co. v. City of Richmond*, 26 Gratt. (Va.) 1 (1875).

throughout a considerable number of States as "a unit," that is to say, as it has been expressed, as a "system," among the parts of which there is an "organic relation" or "organic connection" or "organic unity," such a part being said to "have its actual uses only in connection with other parts of the system."²² This is well illustrated in case of property used for transportation by railroad or communication by telegraph. In such a case there is obvious difficulty in determining the value of a portion of the system in a given State considered separately, and it is established that there may be employed a method of proportionate valuation, this being ordinarily done according to a "mileage basis," so called, that is, by taking such part of the entire valuation as is measured by the proportion of the length of the line operated within the State to the entire length.²³ The correct-

²² *Fargo v. Hart*, *infra*.

²³ Such method was held properly applied to property used for communication by telegraph, in *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Supm. 961, 31 L. ed. 790 (1888); on writ of error from *Attorney-General v. Western Union Tel. Co.*, 33 Fed. 129 (C. C. Mass., 1887); *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 11 Supm. 889, 35 L. ed. 628 (1891); *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 16 Supm. 1054, 41 L. ed. 49 (1896), affirming 141 Ind. 281, 40 N. E. 1051, 60 L. R. A. 671 (1895); *Western Union Tel. Co. v. Missouri*, 190 U. S. 412, 23 Supm. 730, 47 L. ed. 1116 (1903), affirming *State v. Western Union Tel. Co.*, 165 Mo. 502, 65 S. W. 775 (1901); *Western Union Tel. Co. v. Henderson*, 68 Fed. 588 (C. C. Ind., 1895); *Western Union Tel. Co. v. Poe*, 69 Fed. 557, 16 C. C. A. 683 (6th C. 1895), affirmed in *Adams Express Co. v. Ohio State Auditor* (*Sanford v. Poe*), *infra*. See previous decision in 64 Fed. 9 (C. C. Ohio, 1894); *Western Union Tel. Co. v. Norman*, 77 Fed. 13 (C. C. Ky., 1896), appeal dismissed in 17 Supm. 1002 (1896). See *Western Union Tel. Co. v. Dodge County*, 113 N. W. 805 (Supm. Ct. Neb., 1907).

So for transportation by railroad, *Cleveland, Cincinnati, etc., Ry. Co. v. Backus*, 154 U. S. 439, 14 Supm. 1122, 38 L. ed. 1041

ness of the result depends, and should be regarded as depending, on the assumption that, as a preliminary, the total valuation has been correctly ascertained. It

(1894), affirming 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729 (1893); *Chicago, Burlington & Quincy Ry. Co. v. Babcock*, 204 U. S. 585, 27 Supm. 326, 51 L. ed. 636 (1907). And see *Pittsburgh, Cincinnati, etc., Ry. Co. v. Backus*, 154 U. S. 421, 14 Supm. 1114, 38 L. ed. 1031 (1894), affirming 133 Ind. 625, 33 N. E. 432 (1893). So in *Reinhart v. McDonald*, 76 Fed. 403 (C. C. Cal., 1896); *St. Louis, I. M. & S. Ry. Co. v. Davis*, 132 Fed. 629 (C. C. Ark., 1904); *State v. N. Y., New Haven & Hartford R. R. Co.*, 60 Conn. 326, 22 Atl. 765 (1891); *Indianapolis & Vincennes Ry. Co. v. Backus*, 133 Ind. 609, 33 N. E. 443 (1893).

So as applied to valuation of sleeping cars continuously running into, through, and out of the State, the valuation being according to the number of miles of railroad over which such cars are run, *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Supm. 876, 35 L. ed. 613 (1891), affirming 107 Pa. St. 156 (1884); *Pullman's Palace Car Co. v. Hayward*, 141 U. S. 36, 11 Supm. 883, 35 L. ed. 621 (1891); *Board of Assessors of Parish of Orleans v. Pullman's Palace Car Co.*, 60 Fed. 37, 8 C. C. A. 490 (5th C. 1894), affirming *Pullman's Palace Car Co. v. Board of Assessors*, 55 Fed. 206 (C. C. La., 1893); *City of Covington v. Pullman Co.*, 89 S. W. 116 (Ct. App. Ky., 1905). See also *Pullman's Palace Car Co. v. Twombly*, 29 Fed. 658 (C. C. Iowa, 1887). On this point seems overruled *State v. Woodruff Sleeping & Parlor Coach Co.*, 114 Ind. 155, 15 N. E. 814 (1888).

So as to express refrigerator cars, *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 Supm. 599, 43 L. ed. 899 (1899), affirming *Hall v. American Refrigerator Transit Co.*, 24 Colo. 291, 51 Pac. 421, 56 L. R. A. 89, 65 Am. St. Rep. 223 (1897); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 Supm. 631, 44 L. ed. 708 (1900), affirming 18 Utah, 378, 55 Pac. 639, 48 L. R. A. 790 (1898).

So as to transportation by express, *American Express Co. v. Indiana*, 165 U. S. 255, 17 Supm. 991, 41 L. ed. 707 (1895); *Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 Supm. 527, 41 L. ed. 960 (1897); *Fargo v. Hart, infra*; *Wells, Fargo & Co.'s Express v. Crawford County*, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371 (1897). As to distinction between property used for such purpose, and property used for transportation by railroad, or communication by telegraph, see *Adams Express Co. v. Ohio State*

will be seen, however, that such total valuation, commonly based on the value of the capital stock of the corporation operating the lines, includes property that it is beyond the authority of the State to tax, consistently with the doctrine elsewhere seen to be established.²⁴ Doubtless the employment of the method of proportionate valuation, according to a mileage basis, is ordinarily free from objection, thus, "so long as it fairly may be assumed that the different parts of a line are about equal in value,"²⁵ but it is, to say the least, not clear that it would be thus free from objection in the case of the value of such a part being substantially in excess of that of others, as in case of railroad "terminals in one State equal in value to all the rest of the line through another." Furthermore, there should not be included in such total valuation any other property that it is beyond the authority of

Auditor, 165 U. S. 194, 221, 17 Supm. 305, 309, 41 L. ed. 683 (1897).

It will be observed that it makes no difference whether it is to the property of a domestic or of a foreign corporation that such method is employed.

²⁴ See § 115.

²⁵ *Fargo v. Hart*, *infra*. It was here said that in *Pittsburgh, Cincinnati, etc., Ry. Co. v. Backus*, *supra*, "there was reason to suspect an infraction of constitutional rights," but in view of testimony that there was no assessment of property outside of the State, "the court could not say that there was more than a possible overvaluation." And in *Fargo v. Hart* it was said that in *Adams Express Co. v. Ohio State Auditor*, *supra*, "it was pointed out that there was nothing to show that the line might not fairly be assumed to be of substantially the same value throughout," it being intimated, however, that if the fact should be proved to be otherwise, a different rule might apply.

In *Western Union Tel. Co. v. Taggart*, *supra*, provision was made by statute for "deductions on account of a greater proportional value" of property outside the State, "or for any other reason," so that the valuation should be at the "true cash value only."

the State to tax, thus, because of being beyond its territorial jurisdiction.²⁶

§ 114. Property acquired (e. g., earnings or receipts) in course of transportation within scope of commerce clause.

It has been seen that restrictions invalidly imposed under the authority of a State upon transportation within the scope of the commerce clause have commonly been by way of requirement of payment of a tax, commonly termed a "license" or "privilege" tax.²⁷ Such a tax should be carefully distinguished from a tax not imposed as a condition of engaging in such transportation. It has just been seen that it is no objection to taxation of property that it is *employed* in such transportation. There seems to us, at least, as much reason for the view that it is no objection to taxation thereof that it has been *acquired* in the course of such transportation. In no sense is such tax imposed as a *condition* of engaging in such transportation, however much the prospect of the imposition thereof may operate as an effective deterrent from so engaging. Contrary, however, to this view is what seems to us to be the entirely unsound, though well-established, view, that under certain conditions it is beyond the power of the State to impose a tax on property, not, indeed, as a condition of engaging in such transportation, but merely because of such property

²⁶ Thus, in *Fargo v. Hart*, 193 U. S. 490, 24 Supm. 498, 48 L. ed. 761 (1904), were held erroneously included securities held outside the State, but not used in connection with the business of the corporation. To like effect, *Coulter v. Weir*, 127 Fed. 897, 62 C. C. A. 429 (6th C. 1904). See *Chicago, Burlington & Quincy Ry. Co. v. Babcock*, 204 U. S. 585, 27 Supm. 326, 51 L. ed. 636 (1907).

As to deduction for local taxation, see *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 221, 17 Supm. 305, 339, 41 L. ed. 683 (1897); *Western Union Tel. Co. v. Taggart*, *supra*.

²⁷ See § 70.

having been acquired in the course thereof, thus, what are commonly known as "earnings" or "receipts."²⁸

²⁸ Thus, in *State Freight Tax Case* (*Reading R. R. Co. v. Pennsylvania*), 15 Wall. 232, 21 L. ed. 146 (Dec. 1872), reversing *Tonnage Tax Cases*, 62 Pa. St. 286, 1 Am. Rep. 399 (1869), of the imposition of a tax per ton on freight carried, though, so far as appears, not as a condition of engaging in transportation within the scope of the commerce clause. To like effect, *Erie Ry. Co. v. Pennsylvania*, 15 Wall. 282, 21 L. ed. 164 (Dec. 1872); *Erie Ry. Co. v. State*, 31 N. J. Law, 531, 86 Am. Dec. 226 (1864); *State v. Cumberland & Pennsylvania R. R. Co.*, 40 Md. 22 (1873). See also *Pennsylvania R. R. Co. v. Commonwealth*, 3 Grant Cas. (Pa.) 128 (1860). Undoubtedly overruled is *Raritan & Delaware Bay R. R. Co. v. Delaware & Raritan Canal, etc., R. R. Co.*, 18 N. J. Eq. 546 (1867), sustaining requirement of payment of specified sum for each person carried across the State.

But the following reasoning of counsel in *State Freight Tax Case* (p. 251) seems to us to be unanswerable: "Does it (the tax) make a rule to govern the shipment of a ton of coal passing out of the State? It clearly does not, for a ton of coal is shipped just as freely, without either the knowledge or interference of the State, as though there was no such law in force. It is not until months after the ton has been shipped that the State knows the fact; it is not until months later that the tax is payable by the company. How then can this be a rule to govern the intercourse?"

In *State Tax on Railway Gross Receipts* (*Reading R. R. Co. v. Pennsylvania*), 15 Wall. 284, 21 L. ed. 164 (Dec. 1872), indeed, by virtue of application of a forced and extremely artificial distinction between a tax on freight and a tax on gross receipts, the latter, though derived from transportation within the scope of the commerce clause, were held (in case of a domestic corporation) subject to such tax. So as to a foreign corporation, in *Erie Ry. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595 (Oct. 1874). To like effect, *Delaware Railroad Tax*, 18 Wall. 206, 232, 21 L. ed. 888 (Oct. 1873), affirming *Minot v. Philadelphia, W. & B. R. Co.*, 2 Abb. (U. S.) 323, 17 Fed. Cas. No. 9,645 (1870); *Buffalo & Erie R. R. Co. v. Commonwealth*, 3 Brewst. (Pa.) 386 (1871); *Pullman's Palace Car Co. v. Commonwealth*, 107 Pa. St. 148 (1884); *Western Union Tel. Co. Commonwealth*, 110 Pa. St. 405, 20 Atl.

It will presently be seen, however, that such rule has been in part authoritatively repudiated, so that its

720 (1885). See *State v. Philadelphia, Wilmington, etc., R. R. Co.*, 45 Md. 361, 24 Am. Rep. 511 (1876).

But such distinction was repudiated in *Fargo v. Michigan*, 121 U. S. 230, 7 Supm. 857, 30 L. ed. 888 (1887), reversing 57 Mich. 598, 24 N. W. 538 (1885), holding invalid (in case of a foreign corporation) the imposition of a tax on account of receipts in the course of such transportation. See *Walcott v. People*, 17 Mich. 68 (1868). So as to a domestic corporation, in *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Supm. 1118, 30 L. ed. 1200 (1887), reversing 104 Pa. St. 109 (1883). So of tax for telegraphic messages sent, in *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067 (Oct. 1881), reversing *Western Union Tel. Co. v. State*, 55 Tex. 314 (1881), subsequent decision in 62 Tex. 630 (1884); *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39, 9 Supm. 6, 32 L. ed. 345 (1888). So of tax on receipts for such messages, in *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, 8 Supm. 1127, 32 L. ed. 229 (1888); *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472, 10 Supm. 161, 33 L. ed. 409 (1889), reversing 80 Ala. 273, 60 Am. Rep. 99 (Dec. T. 1885).

It is not apparent that it makes any difference that the provision for taxation appears in the charter of a corporation, instead of in general legislation. On this point the following decisions seem to be no longer authority: *Railroad Co. v. Maryland*, 21 Wall. 456, 22 L. ed. 678 (Oct. 1874), affirming *State v. Baltimore & Ohio R. R. Co.*, 34 Md. 344 (1871); *Baltimore & Ohio R. R. Co. v. State*, 45 Md. 596 (1877). See *State v. Cumberland & P. R. Co.*, 66 Atl. 458 (Ct. App. Md., 1907); article in 1 Ill. Law Rev. 440 (1907), by Henry Schofield; in 2 Id. 21 (1907), by J. P. Hall; Prentice & Egan's Commerce Clause, p. 298.

For other instances of the imposition of a tax on account of receipts in the course of such transportation held invalid, see *Delaware & Hudson Canal Co. v. Commonwealth*, 1 Monag. (Pa.) 36, 17 Atl. 175, 1 L. R. A. 232 (1888); *Indiana ex rel. v. American Exp. Co.*, 7 Biss. 227, 13 Fed. Cas. No. 7,021 (1876); *Vermont & Canada R. R. Co. v. Vermont Central R. R. Co.*, 63 Vt. 1, 21 Atl. 262, 731, 10 L. R. A. 562 (1890); *Ratterman v. Express Co.*, 49 Ohio St. 608, 32 N. E. 754 (1892); *Northern Pacific R. R. Co. v. Raymond*, 5 Dak. 356, 369, 40 N. W. 538, 542, 1 L. R. A. 732, 734 (1888).

On this point seem overruled *American Union Express Co. v.*

partial application presents a glaring inconsistency tending to produce great confusion. So far as the

City of St. Joseph, 66 Mo. 675, 27 Am. Rep. 382 (1877); *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521 (1876).

See, generally, *Matter of Pennsylvania Tel. Co.*, 48 N. J. Eq. 91, 20 Atl. 846, 27 Am. St. Rep. 462 (1891); *Southern Express Co. v. Hood*, 15 Rich. Law (S. C.), 66, 94 Am. Dec. 141 (1867); *State v. State Board of Assessment*, 3 S. D. 338, 53 N. W. 192 (1892).

N. Y., Lake Erie & Western R. R. Co. v. Pennsylvania, 158 U. S. 431, 15 Supm. 896, 39 L. ed. 1043 (1895), affirming *Commonwealth v. N. Y., P. & O. R. Co.*, 145 Pa. St. 38, 22 Atl. 212 (1891), where the circumstances were peculiar, may not be in entire harmony with the general doctrine. Here a tax upon the gross receipts of a railroad corporation for "tolls and transportation" was sustained as applicable to the receipts of a foreign corporation from another corporation leasing a branch road wholly within the State, though the lessee was engaged in transportation within the scope of the commerce clause. The interference with such transportation produced by imposition of the tax was regarded as merely an "incidental effect." The tax was also sustained as applied to receipts from another corporation leasing another branch lying only partly within the State, the tax being, however, apportioned according to the portion within the State. So held, though all the business done over the road by the lessee was transportation within the scope of the commerce clause.

And *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S. 379, 24 Supm. 107, 48 L. ed. 229 (1903), seems hard to reconcile with the general doctrine. Here was sustained the imposition of a tax on receipts not only for transportation wholly within the State but for *transportation within the scope of the commerce clause*, though, indeed, by the rule of proportionate valuation already considered. The court seem to have misapprehended the effect of *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Supm. 121, 163, 35 L. ed. 994 (1891), which, however, as already explained (see § 73a), seems to rest on a distinction between a *tax on the receipts themselves*, and a *tax, the amount of which is determined by a reference to the amount of the receipts*. While the tax under consideration in *Maine v. Grand Trunk Ry. Co.* is, or may have been, within the latter class, that in *Wisconsin & Michigan Ry. Co. v. Powers* seems clearly to have been within the former, and hence contrary to the established doctrine. See

commerce clause is concerned, there is no objection to the imposition of a tax under the authority of a State upon earnings or receipts from transportation wholly within the State, though engaged therein by one also engaged in transportation within the scope of the commerce clause.²⁹

§ 115. The same; "intangible property."

It has already been stated that the rule allowing taxation, under the authority of a State, of property acquired in the course of transportation within the scope of the commerce clause, has been in part repudiated, and it remains to point out how this result has been reached by giving effect to the rule allowing such taxation of "intangible property," the result being inconsistency and confusion.³⁰ Commonly, though, it

also as to proportionate valuation of gross receipts *State of Indiana v. Pullman Palace Car Co.*, 16 Fed. 193 (C. C. Ind., 1883).

²⁹ So held in *Pacific Express Co. v. Seibert*, 142 U. S. 339, 12 Supm. 250, 35 L. ed. 1035 (1892), affirming 44 Fed. 310 (C. C. Mo., 1890), as to receipts from transportation by express. So of receipts of palace car company, in *State v. Pullman's Palace Car Co.*, 64 Wis. 89, 23 N. W. 871 (1885). See also *Southern Building & Loan Assoc. v. Norman*, 98 Ky. 294, 32 S. W. 952, 31 L. R. A. 41, 56 Am. St. Rep. 367 (1895).

And in *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, 8 Supm. 1127, 32 L. ed. 229 (1888), a single tax assessed in gross and without separation or apportionment upon receipts for telegraph messages, some sent between points both within the State, but others to points outside of the State, was sustained as to the former, though held invalid as to the latter. To like effect, *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472, 10 Supm. 161, 33 L. ed. 409 (1889). See also *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Supm. 806, 36 L. ed. 672 (1892); *Ratterman v. Express Co.*, *supra*; *Northern Pac. R. Co. v. Barnes*, 2 N. D. 310, 351, 51 N. W. 386, 397 (1892).

³⁰ Thus, in *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Supm. 305, 41 L. ed. 683 (1897), affirming *Sanford v. Poe*, 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641 (6th C. 1895),

would seem, by no means necessarily, such rule has been applied to taxation of the capital stock (or it may which affirmed 64 Fed. 9 (C. C. Ohio, 894); see 61 Fed. 449, 470 (C. C. Ohio, 1894), was sustained the imposition of a tax upon an express company largely engaged in transportation within the scope of the commerce clause, under a statute providing that in determining the value of its property the assessing body should "be guided by the value of said property as determined by the value of *the entire capital stock*." The decision obviously rests on what we regard as the erroneous and gratuitous assumption that there was no alternative between taxing the property irrespective of the particular use to which it was put, and taxing it with reference to its use for transportation within the scope of the commerce clause, as well as transportation wholly within the State. But there was a third alternative entirely overlooked or ignored by the the court, that of taxing it with reference to its use for transportation wholly within the State. See 165 U. S. 222, 17 Supm. 309. This was followed under like conditions in *American Express Co. v. Indiana*, 165 U. S. 255, 17 Supm. 991, 41 L. ed. 707 (1897), affirming *State v. Adams Express Co.*, 144 Ind. 549, 42 N. E. 483 (1895). See subsequent decision in *Adams Express Co. v. Ohio State Auditor*, in 166 U. S. 185, 17 Supm. 604, 41 L. ed. 965 (1897), which was applied in *Wells, Fargo & Co.'s Express v. Crawford County*, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371 (1897). See also *State v. Jones*, 51 Ohio St. 492, 37 N. E. 945 (1894).

Objectionable on the same ground seems *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Supm. 532, 41 L. ed. 953 (1897), affirming 99 Ky. 623, 31 S. W. 486, 29 L. R. A. 73 (1895), where was sustained a tax as on the "intangible property" of a corporation that, though not itself directly engaged in transportation within the scope of the commerce clause, received tolls for the privilege of using a bridge for the purpose of such transportation. This was followed under like conditions in *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U. S. 626, 20 Supm. 205, 44 L. ed. 299 (1900), affirming 167 Ill. 15, 47 N. E. 313 (1897). See subsequent decision in 176 Ill. 267, 52 N. E. 117 (1898). Also to like effect, *Covington & C. Bridge Co. v. City of Covington*, 89 S. W. 296 (Ct. App. Ky., 1905).

So in *Western Union Tel. Co. v. Norman*, 77 Fed. 13 (C. C. Ky., 1896); appeal dismissed in 17 Supm. 1002 (1896), was sustained as a tax on the "intangible property" of a corporation a

be other securities) of a corporation engaged in such transportation. Now, obviously, such capital stock as representative of the property of such corporation derives, to a large extent at least, its value from its *use*,³¹ in other words its value is based on *what is derived from the use of such property* in the form of *earnings or receipts*. In case of a corporation engaged principally in transportation within the scope of the commerce clause, though, it may be, partly in transportation wholly within a State, obviously the value of its capital stock (or other securities) must be largely based on *what is derived from the use of such property for transportation within the scope of the commerce clause* in the form of earnings or receipts. It seems clear to us that *to the extent that such value is based on such earnings or receipts*, the capital stock (or other securities) is as much exempt from taxation as are the earnings or receipts themselves. It seems clear that the capital stock (or other securities) is,

tax in terms on its "franchise." To the same effect under the same statute, *Coulter v. Weir*, 127 Fed. 897, 907, 62 C. C. A. 429, 439 (6th C. 1904). In *Louisville & Jeffersonville Ferry Co. v. Commonwealth*, 108 Ky. 717, 725, 57 S. W. 624, 626 (1900), was sustained a tax on the franchise of a domestic corporation solely engaged in transportation within the scope of the commerce clause, its income being alone considered in fixing the value of the franchise. See as to taxation of such franchise *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Supm. 817, 47 L. ed. 995 (1903).

It will readily be seen, however, that the objections here stated do not apply to a mere tax upon the "franchise or business" (so-called) of a corporation in so far as confined to transactions not within the scope of the commerce clause, though such corporation be also engaged in transportation within the scope thereof.

³¹ This was clearly seen in *Cleveland, Cincinnati, etc., Ry. Co. v. Backus*, 154 U. S. 439, 14 Supm. 1122, 38 L. ed. 1041 (1894), where it was said: "The value of property results from the use to which it is put, and varies with the profitableness of that use." See also *Adams Express Co. v. Ohio State Auditor*, *supra* (165 U. S. 222, 226, 17 Supm. 309, 311).

generally speaking, identical with the earnings or receipts, in this sense, that the value of the capital stock is merely a capitalization of the earnings or receipts.³² Nor does it need pointing out that the employment of the method of proportionate valuation does not remove the difficulty; the result is simply that a smaller amount of property that should be regarded as exempt from taxation is made subject thereto; the difference is one of degree, not of principle. If there be urged the difficulty of distinguishing the value of such securities, as based on the use of property for transportation within the scope of the commerce clause, from its value as based on its use for transportation within the State,³³ it may be replied that a capitalization of receipts for transportation wholly within the State would, at least in the absence of a better test, reasonably and approximately result in a satisfactory valuation.

³² For decisions more or less clearly recognizing or applying the method of capitalization of receipts in ascertaining value for purposes of taxation, see *State v. Virginia & Truckee R. R. Co.*, 23 Nev. 283, 46 Pac. 723, 35 L. R. A. 759 (1896); *State v. Nevada Central R. R. Co.*, 26 Nev. 357, 68 Pac. 294, 69 Pac. 1042 (1902); *People v. Hicks*, 40 Hun (N. Y.), 598 (1886); *People ex rel. N. Y. Central, etc., R. R. Co. v. Feitner*, 38 Misc. 204, 77 N. Y. Suppl. 218 (Supm. Ct., N. Y. Sp. T., 1902); *Oregon & Cal. R. R. Co. v. Jackson County*, 38 Oreg. 589, 621, 64 Pac. 307, 317 (1901); *Chicago Union Traction Co. v. State Board*, 114 Fed. 557 (C. C. Ill., 1902).

³³ Thus in *Cleveland, Cincinnati, etc., Ry. Co. v. Backus*, *supra*, in case of taxation of railroad property, it was thought by the court to be "impossible to disintegrate the value of that portion of the road within (the State) and determine how much of that value springs from its use in doing interstate business and how much from its use in doing business wholly within the State." Conceding difficulty, we deny impossibility.

§ 116. Charge for special facilities; e. g., for wharfage; charge for governmental supervision.

In addition to ordinary taxation, there is, so far as the commerce clause is concerned, no objection to the imposition, under the authority of a State, upon one engaged in transportation within the scope of the commerce clause, of a charge for the use of special facilities,³⁴ the most notable instance being a charge for wharfage, as applied to vessels engaged in navigation within the scope of the commerce clause,³⁵ even though

³⁴ Thus in *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Supm. 485, 37 L. ed. 380 (1893), reversing 39 Fed. 59 (C. C. Mo., 1889); *Postal Tel. Cable Co. v. Mayor, etc., of Baltimore*, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161 (1894), affirmed in 156 U. S. 210, 15 Supm. 306, 39 L. ed. 399 (1895), were sustained charges imposed, by ordinance, as rental for space occupied by telegraph poles. So in *Postal Tel. Cable Co. v. City of Newport*, 76 S. W. 159 (Ct. App. Ky., 1903), for use of streets and alleys for erecting poles and stringing wires. So in *Bogart v. State*, 10 Ohio Dec. (Reprint) 365 (1888), for use of streets by vehicle, the amounts received being used for repairing the streets.

³⁵ The power to impose such charges has frequently been assimilated to the power to establish regulations as to pilotage. See, for instance, *Transportation Co. v. Parkersburg*, 107 U. S. 691, 702, 2 Supm. 732, 741, 27 L. ed. 584 (1883). But this seems misleading. See § 107.

Such charges have commonly been imposed by ordinance of the municipality that has at its own cost provided the wharf or other facility. Such charges were sustained, or relief thereagainst denied, in *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. ed. 688 (Oct. 1879), affirming *Northwestern Union Packet Co. v. St. Louis*, 4 Dill. 10, 18 Fed. Cas. No. 10,345 (1877); *Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. ed. 1169 (Oct. 1881); *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 7 Supm. 907, 30 L. ed. 976 (1887), affirming 16 Fed. 890 (C. C. La., 1883); *The Ann Ryan*, 7 Ben. 20, 1 Fed. Cas. No. 428 (1873); *Leathers v. Aiken*, 9 Fed. 679 (C. C. La., 1881); *People ex rel. State Harbor Commrs. v. Roberts*, 25 Pac. 496 (Supm. Ct. Cal., 1891); *City of Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa, 196 (1876); *Worsley v. Second Municipality*, 9 Rob. (La.) 324, 41 Am. Dec. 333 (1844);

enrolled or licensed under authority of Congress.³⁶ It seems to be established that, so far as the commerce clause is concerned, it is no objection to a charge for

Ellerman v. McMains, 30 La. Ann. 190, 31 Am. Rep. 218 (1878); *Sweeney v. Otis*, 37 La. Ann. 520 (1885); *Benedict v. Vanderbilt*, 25 How. Pr. 209 (N. Y. Super. Ct., Gen. T., 1863); *State v. City Council of Charleston*, 4 Rich. Law (S. C.), 286 (1851); *Sterrett v. City of Houston*, 14 Tex. 153 (1855).

See *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 214, 5 Supm. 826, 833, 29 L. ed. 158 (1885); *City of Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa, 185 (1876).

Thus in *Ouachita Packet Co. v. Aiken*, *supra*, the charges sustained were professedly for wharfage, though graduated by the tonnage of vessels using the wharf. See as to effect of manner of appropriation of receipts and of realization of profit beyond amount of expenditures. So in *Packet Co. v. Keokuk*, *infra*, was sustained charge for use of wharf built, paved, and improved at large expense, the rates charged being no more than sufficient to meet the interest of the debt incurred for building and improving the wharf. So in *Packet Co. v. St. Louis*, *supra*, as to charge "not out of proportion to the advantages and benefits enjoyed" and "for the use of an improved wharf and not for the mere privilege of entering or stopping at" the port in question, "or for landing at the shore, in its natural condition, where there were no conveniences which could be called a wharf." Followed under like conditions in *Vicksburg v. Tobin*, 100 U. S. 430, 25 L. ed. 690 (Oct. 1879).

As to recovery for services performed by harbor master, see *Harbor Master & Port Wardens of Mobile v. Southerland*, 47 Ala. 511 (1872).

To the same rule seems referable *Henry v. Roberts*, 50 Fed. 902 (C. C. Md., 1892), sustaining provision as to compensation for use of littoral lands by timber cast on shores of navigable waters.

As to admiralty jurisdiction in cases of wharfage, see § 43; *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373 (Oct. 1877).

As to imposition of such charges on property of the Federal government, see *State Toll on Government Property*, 23 Op. Atty.-Gen. 299 (1900).

³⁶ *Transportation Co. v. Parkersburg*, 107 U. S. 691, 2 Supm. 732, 27 L. ed. 584 (1883); *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377 (Oct. 1877).

wharfage that it is merely unreasonable.³⁷ But such a charge may be such as to be within the prohibition of the commerce clause as imposing an unnecessarily onerous burden upon transportation within the scope thereof, thus, "by roundabout means invading the domain of Federal authority,"³⁸ as where there is pro-

³⁷ Relief on such ground was denied in *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 7 Supm. 907, 30 L. ed. 976 (1887). To like effect, *Transportation Co. v. Parkersburg*, *supra*. See *First Municipality v. Pease*, 2 La. Ann. 538 (1847). In *Packet Co. v. St. Louis*, *supra*; *Packet Co. v. Keokuk*, *supra*, it distinctly appeared that the charges in question were reasonable. In *Packet Co. v. St. Louis* relief was denied, it not appearing that the wharfage fees in question were exacted for the purpose of increasing the general revenue of the municipality in question, beyond what was necessary to meet its outlay in maintaining the wharves in suitable condition. Followed under like conditions in *Vicksburg v. Tobin*, 100 U. S. 430, 25 L. ed. 690 (Oct. 1879).

³⁸ *Ouachita Packet Co. v. Aiken*, *supra*.

The following are instances of provisions held invalid in view either of the commerce clause or of the prohibition of duties on tonnage or of both. Thus in *Steamship Co. v. Port Wardens*, 6 Wall. 31, 18 L. ed. 749 (Dec. 1867), of a provision that the master and wardens of the port of New Orleans should be entitled to receive a specified sum, whether called upon to perform any service or not, for every vessel arriving at that port. Here was overruled *Master & Wardens of Port of New Orleans v. Ship Martha J. Ward*, 14 La. Ann. 289 (1859). And see *Master & Wardens of Port of New Orleans v. Prats*, 10 Rob. (La.) 459 (1845). To similar effect with *Steamship Co. v. Portwardens* is *Webb v. Dunn*, 18 Fla. 721 (1882). So in *Foster v. Master & Wardens*, 94 U. S. 246, 24 L. ed. 122 (Oct. 1876), reversing *Master & Wardens of Port of New Orleans v. Foster*, 26 La. Ann. 105 (1874), of a prohibition of surveys of hatches of seagoing vessels or of damaged goods coming on board thereof, save by such master and wardens. As to survey before leaving port, see *Master & Wardens of Port of N. Y. v. Cartwright*, 4 Sandf. (N. Y.) 236 (1850). So in *City of St. Louis v. Consolidated Coal Co.*, 158

duced discrimination against products of other States.³⁹ In some instances such charges have been held invalid in view of the provision that "no State shall without the consent of Congress lay any duty of tonnage," rather than of the commerce clause.⁴⁰ It seems rea-

Mo. 342, 59 S. W. 103, 51 L. R. A. 850, 81 Am. St. Rep. 310 (1900), of charge, not as compensation for use of wharf, but for privilege "of towing boats or other water craft into or out of the harbor or from one place to another" within the harbor. So held, notwithstanding provision that amount paid "should be in lieu of all wharfage."

Steamship Co. v. Portwardens was applied under like conditions in *Hackley v. Geraghty*, 34 N. J. Law, 332 (1870); affirmed in *Geraghty v. Hackley*, 36 id. 459. (1872).

For instances of charges for wharfage held not sustainable, see *The Lizzie E.*, 30 Fed. 876 (C. C. La., 1887); *City of New Orleans v. Wilmot*, 31 La. Ann. 65 (1879); *City of Shreveport v. Red River & Coast Line*, 37 La. Ann. 562, 55 Am. Rep. 504 (1885).

So as to port charges in *Harbor Commissioners v. Pashley*, 19 S. C. 315 (1883), applying *Alexander v. Wilmington, etc., R. R. Co.*, 3 Strobb. Law (S. C.), 594 (1849).

³⁹ Thus in *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743 (Oct. 1879), was held invalid a provision for collection of wharfage from vessels "landing, depositing or transporting goods or articles other than the productions of this State." On the same ground a provision was held invalid in *Broeck v. Barge John M. Welch*, 2 Fed. 364 (C. C. N. Y., 1880), reversing *The John M. Welch*, 9 Ben. 507, 13 Fed. Cas. No. 7,359 (1878). See also *The Wharf Case*, 3 Bland Ch. (Md.) 361, 374 (1831); *People ex rel. State Harbor Commrs. v. Roberts*, 25 Pac. 496 (Supm. Ct. Cal., 1891). But in *The Ann Ryan*, 7 Ben. 20, 1 Fed. Cas. No. 428 (1873), such charge was sustained as making no discrimination "in favor of the citizens of the State," though "in favor of the canal navigation of the State."

⁴⁰ Thus in *Cannon v. New Orleans*, 20 Wall. 577, 22 L. ed. 417 (Oct. 1874), reversing 27 La. Ann. 16 (1875), it was solely in view of such prohibition of any duty on tonnage that there was held not sustainable an imposition of "levee and wharfage dues

sonably clear that, so far as concerns transportation within the scope of the commerce clause, it is within the power of Congress to make provisions as to wharfage, thus by way of requirement that charges be reasonable.⁴¹ Closely analogous to such charges for special facilities are charges for the expense of governmental supervision of a business so carried on as to justify such supervision.⁴² The question has most frequently arisen as to charges for local inspection, commonly imposed by municipal ordinance, of property, thus, poles and wires used for communication by tele-

on all steamboats which shall moor or land in any part of the port of New Orleans," such dues being measured by the capacity of the vessel. It appeared that the length of both shores of the Mississippi embraced by the port of New Orleans was at least twenty-two miles; that the entire portion of the shore on which wharves had been built was at most two miles. See also *State Tonnage Tax Cases (Cox v. Collector)*, 12 Wall. 204, 20 L. ed. 370 (Dec. 1870), reversing *Lott v. Mobile Trade Co.*, 43 Ala. 578 (1869); *Peete v. Morgan*, 19 Wall. 581, 22 L. ed. 201 (Oct. 1873).

In addition to instances referred to in note 38 are the following of violation of the prohibition against laying a duty on tonnage: *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 24 L. ed. 118 (Oct. 1876); *Way v. N. J. Steamboat Co.*, 133 Fed. 188 (D. C. N. Y., 1904); *Johnson v. Drummond*, 20 Gratt. (Va.) 419 (1871). See also *Huse v. Glover*, 119 U. S. 543, 7 Supm. 313, 30 L. ed. 487 (1886).

As to State quarantine law, see *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 6 Supm. 1114, 30 L. ed. 237 (1886).

⁴¹ See *Transportation Co. v. Parkersburg*, *supra*; *Ouachita Packet Co. v. Aiken*, *supra*.

⁴² In *Charlotte, Columbia, etc., R. R. Co. v. Gibbes*, 142 U. S. 386, 12 Supm. 255, 35 L. ed. 1051 (1892), was sustained, as applicable to a corporation engaged in interstate railroad transportation, the imposition of a tax to meet the expenses of a State railroad commission proportioned to mileage in the State.

graph. Such a charge is, however, held to be invalidly imposed if unreasonably large.⁴³

⁴³ As to such charges and conditions of determination of their validity, see *Western Union Tel. Co. v. New Hope*, 187 U. S. 419, 23 Supm. 204, 47 L. ed. 240 (1903); *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Supm. 817, 47 L. ed. 995 (1903); *Postal Tel. Cable Co. v. New Hope*, 192 U. S. 55, 24 Supm. 204, 48 L. ed. 338 (1904); *Postal Tel. Cable Co. v. Taylor*, 192 U. S. 64, 24 Supm. 208, 48 L. ed. 342 (1904); *City of Philadelphia v. Western Union Tel. Co.*, 40 Fed. 615 (C. C. Pa., 1889); 82 Fed. 797 (C. C. Pa., 1897); 89 Fed. 454, 32 C. C. A. 246 (3d C. 1898); *Philadelphia v. American Union Tel. Co.*, 167 Pa. St. 406, 31 Atl. 628 (1895); *New Hope Borough v. Postal Tel. Cable Co.*, 202 Pa. St. 532, 52 Atl. 127 (1902); *Taylor Borough v. Postal Tel. Cable Co.*, 202 Pa. St. 583, 52 Atl. 128 (1902); *City of Philadelphia v. Postal Tel. Cable Co.*, 67 Hun, 21, 21 N. Y. Suppl. 556 (1892).

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